Supreme Court, U.S
FILED
JUN 21 1993
OFFICE OF THE CLERK

No. 92-2010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AT&T FAMILY FEDERAL CREDIT UNION and CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL J. LAMBERT
(Counsel of Record)
TERESA BURKE
BINGHAM, DANA & GOULD
1550 M Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 822-9320

Attorneys for Petitioners

June 21, 1993

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Do the plaintiff banks, which assert that they compete with credit unions and which have sued to challenge the National Credit Union's interpretation of the "common bond" provision of the Federal Credit Union Act, satisfy the "zone of interest" test for prudential standing even though

a) the D.C. Circuit ruled that banks were not among the intended beneficiaries of the Act or of the common bond provision;

b) the D.C. Circuit ruled that the general purpose of the FCUA was to promote the growth of credit unions; and

c) Congress did not even arguably intend the common bond provision to limit competition between banks and credit unions?

LIST OF PARTIES

The parties below included the following:

The National Credit Union Administration ("NCUA"), defendant in the district court and appellee below, is the agency charged with the administration and enforcement of the Federal Credit Union Act.

Lexington State Bank, Piedmont State Bank, Randolph Bank and Trust Company and *Bankers Trust of North Carolina* joined the *First National Bank and Trust Company* in bringing this action against the NCUA, as did the *American Bankers Association.* These parties were plaintiffs in the district court and appellants below.

AT&T Family Federal Credit Union ("Family Federal") is a corporation organized and existing under federal law pursuant to the Federal Credit Union Act. Its purpose is to promote thrift among its members and to create a source of credit for productive purposes. *Credit Union National Association* ("CUNA") is a trade association consisting of fifty-two credit union leagues. Its purposes include the representation of the interests of credit unions with respect to legislative and regulatory matters. Family Federal and CUNA (collectively the "Credit Unions") were permitted to intervene as defendants in the district court and were appellees below. They submitted briefs on the standing issue presented here in both the district court and the court of appeals. Neither Family Federal nor CUNA have any parent companies or subsidiaries.

The *North Carolina Alliance of Community Financial Institutions* filed an amicus brief on behalf of the appellants in the proceedings before the Court of Appeals for the District of Columbia Circuit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	3
BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE	6
REASONS FOR GRANTING THE WRIT	6
I. The D.C. Circuit's Opinion is Contrary to Supreme Court Precedents	6
II. The D.C. Circuit's Opinion Creates a Conflict in the Circuits	14
III. Important Questions are Raised	16
A. For Litigants Generally	16
B. For Credit Unions	16
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:

	Page
Air Courier Conference v. American Postal Workers Union, 498 U.S. 517 (1991)	6-7,9-11,14-16
Association of Data Processing Orgs. v. Camp, 397 U.S. 150 (1970)	7-8,11-12,14
Block v. Community Nutrition Inst., 467 U.S. 340 (1984)	8
Branch Bank & Trust Co. v. National Credit Union Admin. 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987)	5,13-15
Chicago v. Atchison, T&S.F.R. Co., 357 U.S. 77 (1958)	8
Clarke v. Securities Industry Ass'n. 479 U.S. 388 (1987)	5,7-9,11-12,14-16
First Nat'l Bank & Trust Co. v. National Credit Union Admin., 772 F. Supp. 609 (D.D.C. 1991)	3-4
First Nat'l Bank & Trust Co. v. National Credit Union Admin., 988 F.2d 1272 (D.C. Cir. 1993)	4-5,8,11,13-15
Hardin v. Kentucky Utils. Co., 390 U.S. 1 (1968)	8
Hazardous Waste Treatment Council v. Thomas ("HWTC IV"), 885 F.2d 918 (D.C. Cir. 1989)	8
Investment Co. Inst. v. Camp, 401 U.S. 617 (1971)	11-12,14
Lujan v. National Wildlife Federation, 497 U.S. 871 (1990)	10
Warth v. Seldin, 422 U.S. 490 (1975)	6

Statutes:

Preamble to Federal Credit Union Act Pub. L. 73-467, 48 Stat. 1217 (1934)	17
5 U.S.C. § 702	2

Table of Authorities Continued

	Page
12 U.S.C. § 36	12
12 U.S.C. § 81	12
12 U.S.C. § 1759	2-3
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ____

AT&T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

1. *First Nat'l Bank & Trust Co. v. National Credit Union Admin.*, 772 F. Supp. 609 (D.D.C. 1991), *see* App. 16a-25a.

2. *First Nat'l Bank & Trust Co. v. National Credit Union Admin.*, 988 F.2d 1272 (D.C. Cir. 1993), *see* App. 1a-15a.

JURISDICTION

On April 2, 1993, the District of Columbia Circuit reversed the district court's dismissal of the plaintiff banks' action on the grounds of prudential standing. Neither the Credit Unions nor the NCUA sought rehearing.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254(1). Both CUNA and Family Federal are "parties" to this action within the meaning of § 1254(1), having been granted leave to intervene in the district court by order entered on April 25, 1991. They joined in, and filed a brief in support of, NCUA's motion to dismiss for lack of standing and briefed the standing issue presented here in the court of appeals.

RELEVANT STATUTES AND REGULATIONS

The Administrative Procedure Act, 5 U.S.C. § 702, provides in pertinent part that

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

The "common bond" provision of the Federal Credit Union Act, 12 U.S.C. § 1759, reads, in pertinent part, as follows:

> Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community or rural district.

STATEMENT OF THE CASE

Five banks and the American Bankers Association (collectively, the "Banks") brought this action against the National Credit Union Administration ("NCUA") challenging NCUA's approval of certain amendments of the charter of the AT&T Family Federal Credit Union ("Family Federal"). These amendments expanded Family Federal's field of membership to include various additional employee groups to which credit union services would not otherwise be available. The Banks claim that these charter amendments violate the "common bond" requirement of the Federal Credit Union Act, which states that "federal credit union membership shall be limited to groups having a common bond of occupation or association. . . ." 12 U.S.C. § 1759. The Banks seek a declaratory judgment that the charter amendments at issue are null and void, and an injunction prohibiting the NCUA from approving similar charter amendments in the future.

Family Federal and Credit Union National Association ("CUNA"), a trade association consisting of fifty-two credit union leagues, were permitted to intervene in the case as parties defendant on April 25, 1991.

On August 9, 1991, the district court dismissed the banks' action on the grounds that the banks lacked prudential standing to challenge the NCUA actions at issue. *First Nat'l Bank & Trust Co. v. National Credit Union Admin.*, 772 F. Supp. 609 (D.D.C. 1991), *See* App. 16a. The Court utilized a two-part test for determining whether the plaintiff banks were within the "zone of interest" of the common bond provision

of the Federal Credit Union Act. First, the Court determined that banks were not "intended beneficiaries" of the common bond provision:

> [T]he Act was passed to establish a place for credit unions within the country's financial market, and specifically not to protect the competitive interest of banks . . . Nor was the common bond requirement included in the Act to protect banks. Instead, it was designed to ensure that credit unions remain responsive to those they were designed to serve.

772 F. Supp. at 612, App. 22a.

Second, the district court applied a "suitable challenger" standard that the D.C. Circuit had articulated in several other cases. The D.C. Circuit's "suitable challenger" test permits plaintiffs who are not intended beneficiaries of the statute in question to sue if their interests merely "coincide" systematically with the interests which Congress did intend to protect and if their suits will not frustrate the purposes of the statute. Using the test, the district court found that banks were not suitable challengers to agency decisions about the common bond provision, because

> [T]he interests of banks will rarely, if ever, coincide with those of credit unions, the interest which Congress did intend to protect. . . .

772 F. Supp. at 612, App. 23a.

The D.C. Circuit reversed. *First Nat'l Bank & Trust Co. v. National Credit Union Admin.*, 988 F.2d 1272 (D.C. Cir. 1993), *See* App. 1a. The Circuit agreed with

the district court that "Congress did not, in 1934 [when the common bond provision was enacted as part of the Federal Credit Union Act], intend to shield banks from competition from credit unions." 988 F.2d at 1275, App. 7a. To the contrary, it found this notion anomalous because Congress' "general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." 988 F.2d at 1275, App. 7a. The common bond provision was the "cement that united credit union members in a cooperative venture and was, therefore, thought important to credit unions' continued success." *Id.* at 1276, App. 7a.

The D.C. Circuit then went on to consider what it described as the "more subtle" question whether banks could be considered "suitable challengers" to enforce the common bond provision. 988 F.2d at 1276, App. 8a. It concluded that the interests of banks were sufficiently congruent with the interests protected by the common bond provision for the court to allow the suit. The Circuit stated that *Branch Bank & Trust Co. v. National Credit Union Admin.*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), an identical case where the Fourth Circuit ruled that banks lacked standing, had been "emptie[d] of its persuasiveness" by *Clarke v. Securities Industry Assn.*, 479 U.S. 388 (1987) with its "explication of the suitable challenger route to standing. . . ." 988 F.2d at 1277, n.3, App. 10a, n.3.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Original jurisdiction was vested in the District Court pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). For purposes of the Credit Unions' motion to dismiss *only*, the Credit Unions have not challenged the Banks' claims that the Article III jurisdictional requirements are met.[1]

REASONS FOR GRANTING THE WRIT

This Court should grant the credit unions' petition and review the District of Columbia Circuit's opinion on writ of certiorari because the opinion conflicts with applicable Supreme Court precedents and creates a conflict in the circuits, and because important questions are raised.

I. The D.C. Circuit's Opinion Is Contrary to Supreme Court Precedents

Certiorari should be granted, first, because the D.C. Circuit has reached a result that extends the test for prudential "zone of interest" standing beyond the limits set by applicable Supreme Court precedents.[2] The

---

[1] For purposes of ruling on a motion to dismiss for lack of standing, the Court must take all material allegations of the complaint as true and construe the complaint in favor of the complaining party. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

[2] The "zone of interest" standard is the second element of a two-part test for standing. A plaintiff suing under the Administrative Procedure Act, 5 U.S.C. § 702, must show, first, that it has suffered injury in fact and thus has been adversely affected or aggrieved by agency action. Then, a plaintiff must establish that it is within the zone of interest to be protected by the relevant statute. *See Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 523 (1991).

D.C. Circuit agreed with the district court that Congress did not intend the FCUA to protect the interests of banks like the plaintiffs. However, without even mentioning *Air Courier Conference v. American Postal Workers' Union*, 498 U.S. 517 (1991), which denied standing because intent to benefit the plaintiffs' interests had not been established, it nevertheless held that the banks met the "zone of interest" test and had standing to sue. It relied upon what it considered to be an alternative route to standing which it traced to a footnote in *Clarke v. Securities Indus. Assn.*, 479 U.S. 388 (1987). The D.C. Circuit held that it was enough for standing if the banks' interests were sufficiently congruent with those of the intended beneficiaries that they were not more likely to frustrate than to further the objectives of the Federal Credit Union Act.

This alternative approach to standing is inconsistent with the zone of interest test because it substitutes a functional standard for the intent standard established in prior Supreme Court case law. Under the zone of interest test, congressional intent to protect interests including those of the potential plaintiff is the critical determining factor for prudential standing. Standing is permitted where "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Orgs. v. Camp*, 397 U.S. 150, 153 (1970). The phrase "to be protected" establishes that congressional intent to protect is at the core of the zone of interest approach.[3]

---

[3] The prior cases cited by the Court in *Data Processing* as

According to the D.C. Circuit, footnote 12 in the *Clarke* decision, 479 U.S. at 397, established an alternative zone of interest analysis that obviates the need to show congressional intent to protect. *See First Nat'l Bank and Trust Co. v. National Credit Union Admin.*, 988 F.2d 1272, 1279 (D.C. Cir. 1993). The pertinent part of the *Clarke* footnote states:

> However, the concern that the plaintiff be 'reliable' carries over to the 'zone of interest' inquiry, which seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.[4]

Clarke, 479 U.S. at 397, n.12.

"closely analogous" also demonstrate that congressional intent with respect to interests to be protected is conclusive. *See Chicago v. Atchison, T&S.F.R. Co.*, 357 U.S. 77, 83-84 (1958) and *Hardin V. Kentucky Utils. Co.*, 390 U.S. 1 (1968). As the *Data Processing* court recognized, both of these cases held that plaintiffs had standing to sue where the statutory provision at issue was designed to protect their interests. *See Data Processing*, 397 U.S. at 154-5 (In *Atchison*, an "existing entrepreneur had standing to challenge the legality of the entrance of a newcomer into the business, because the established business was allegedly protected by a valid city ordinance," while *Hardin* involved "a section of the TVA Act designed primarily to protect . . . private utilities against TVA competition"). Similarly, in *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), the Supreme Court stated that the essential inquiry is whether Congress "intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law." *Id.* at 347.

[4] Citing the same footnote in *Hazardous Waste Treatment Council v. Thomas* ("HWTC IV"), 885 F.2d 918 (D.C. Cir. 1989), the D.C. Circuit described suitable challengers as "parties whose interests, while not in any specific or obvious sense among those Congress intended to protect, coincide with the protected interests." *Id.* at 922.

The Credit Unions assert that the D.C. Circuit has misread and misapplied *Clarke*. In footnote 12, the *Clarke* Court was only describing the purpose of the zone of interest test; it was not creating a new route to standing. Indeed, *Clarke* itself expresses the primacy of congressional intent: "[A]t bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Clarke* at 400.

It is apparent from the D.C. Circuit's language that under its approach, it is possible for a party to be granted standing where it is seeking to advance interests that Congress never intended to protect. In effect, it permits a court to substitute its judgment for that of Congress in deciding which suits are to be allowed. This is directly inconsistent with the principle at the heart of the zone of interest test.

In *Air Courier,* decided several years after *Clarke*, this Court again stressed that congressional intent to protect is the touchstone for determining whether plaintiffs meet the zone of interest test. It stated, "We must inquire, then, as to Congress' intent in enacting the PES in order to determine whether postal workers were *meant to be* within the zone of interests protected by those statutes." 498 U.S. at 524 (emphasis added). There, the Court reversed a decision of the D.C. Circuit that had upheld standing. The action had been brought by unions representing postal workers. They challenged Postal Service regulations that had the effect of reducing revenues. The Unions asserted that they would be injured by the regulations because reduced revenues would lead to the loss of jobs.

The D.C. Circuit's rationale in allowing standing in *Air Courier* was that there was a plausible relationship between the revenue protective provisions of the relevant postal statutes and the plaintiffs' interests in preventing the loss of jobs. The Supreme Court, however, said that the D.C. Circuit's view was "mistaken," and that this was not enough to confer standing because it conflated injury in fact with the zone of interest test. 498 U.S. at 524. The former looks at the *effect* of regulatory activity, while the latter looks at congressional *intent*.[5] Thus, in its analysis, the Supreme Court focused single-mindedly on whether Congress intended to protect the plaintiff postal workers. It did not indulge any presumption in favor of standing.[6]

It is true that in some cases Congress has not expressed its intent in an explicit way. In those circumstances, the role of the court is to seek to infer congressional intent from the language of the statute,

---

[5] The court illustrated this point by referring to the "Lujan hypothetical," which showed how "injury in fact does not necessarily mean one is within the zone of interests to be protected by a given statute." *Air Courier*, 498 U.S. at 524. In *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), this Court posited the failure of an agency to comply with a statutory provision requiring its hearings to be transcribed. This would have an adverse effect on a transcribing company. Although the company would be affected by the agency's action, it would not be entitled to sue because the provision had not been "enacted to protect [its] interests." *Air Courier*, 498 U.S. at 524, citing *Lujan*, 497 U.S. at 883.

[6] The D.C. Circuit did not address *Air Courier* in its opinion although the Credit Unions had relied upon it to support their argument that the plaintiff banks were required to show Congress' intent to benefit their interests.

its overall purposes, and its legislative history. However, inferring congressional intent is far removed from the D.C. Circuit's approach, where the decision to grant standing is based on an assessment of whether the litigants have interests congruent with the class Congress actually intended to protect and whether the plaintiffs are more likely to frustrate or advance the statutory objectives.

In the present case, as in *Air Courier*, the D.C. Circuit failed to focus on the intent of the statute under review and it reached a result inconsistent with Supreme Court precedents. It interpreted *Clarke*, as well as *Data Processing* and *Investment Co. Inst. v. Camp* ("ICI"), 401 U.S. 617 (1971), prior "competitor standing" cases, as supporting the conclusion

> [T]hat a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, *even if the plaintiff's interest is not precisely the one that Congress sought to protect.*

988 F.2d at 1277, App. 9a-10a (emphasis added).

This conclusion ignores congressional intent entirely and represents an extension of *Data Processing*, *ICI* and *Clarke*. Each of these cases, unlike the present one, arose under statutes that reflected clear congressional intent to limit the competitive reach of the regulated entities. It was for that reason that, in each, the Court correctly held that the plaintiffs' competitive interests at least arguably were within the zone of interest Congress intended to protect.

Clarke involved Sections 81 and 36(c) of the National Bank Act (12 U.S.C. §§ 81, 36). Section 81 explicitly "limits the general business" of a national bank to its headquarters and any branches permitted by 36(c); 36(c) allows branching only in a bank's home state and only to the extent permitted under state law. 479 U.S. at 391. The Court in *Clarke* concluded that Congress arguably had legislated against the competition being challenged by the plaintiff brokers, and that there was reason to infer that Congress intended the plaintiffs' class to be relied upon to challenge agency action. 479 U.S. at 403.

In *Data Processing*, the statute at issue (Section 4 of the Bank Service Corporation Act) stated, " 'No bank service corporation may engage in any activity other than the performance of bank services for banks.' " 397 U.S. at 155. Similarly, *ICI* interpreted the Glass-Steagall Act, where the relevant statutory language stated that a national bank "shall not underwrite any issue of securities or stock" and shall not purchase "for its own account . . . any shares of stock of any corporation . . . ." 401 U.S. at 634. In *ICI*, the Court stated that in the case before it as well as in *Data Processing*, Congress had arguably legislated against the competition that the plaintiffs sought to challenge. 401 U.S. at 620.

In short, in the prior competitor standing cases, the Supreme Court has inferred a congressional intent to permit competitors to sue based upon the conclusion that Congress arguably had legislated against the competition being challenged by the competitors, and has held that the zone of interest test was satisfied as a result.

The present case is different. There is no basis to infer an intent to permit bank competitors to sue because it is clear that Congress was not even arguably legislating against competition. The general purposes of the FCUA and the specific purpose of the common bond provision support this conclusion.

The D.C. Circuit recognized that the general purpose of the FCUA was to encourage the growth of credit unions and it said that it was "anomalous" to believe that it was intended to shield banks from credit union competition. 988 F.2d at 1275, App. 7a. It observed that it wasn't until credit unions became successful that bankers began to see the common bond provision as a potential limitation on credit union expansion. *Id.* at 1276, App. 8a. Similarly, the Court of Appeals for the Fourth Circuit in *Branch Bank & Trust Co. v. National Credit Union Admin.*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), ruled that the federal credit union system was established as an alternative to an unacceptable credit structure that included banks. It said that the general purpose of the FCUA suggested not that Congress desired to protect banks, but rather that Congress deliberately sacrificed the competitive interests of banks to the goal of making credit more available to people of limited financial means. 786 F.2d at 626.

Neither is there anything in the common bond provision itself suggesting an intent to protect or benefit banks. While the effect of the common bond provision may be to limit competition if the banks' interpretation of it were adopted, this clearly was not its intent. As the D.C. Circuit stated, the common bond was seen as "the cement that unites credit union members in the cooperative venture, and was, there-

fore, thought important to credit unions' continued success." 988 F.2d at 1276, App. 7a. The Fourth Circuit expressed a similar view in *Branch Bank*:

> There is no evidence from any source cited to this court that Congress also intended by this provision to protect the competitive interests of banks. Given the specific rationale for the common bond requirement, we will not attribute to it a meaning that is at cross purposes with the general goals of the statute. If the NCUA were seen to violate the common bond requirement to the detriment of union members, they would possess standing to sue. The banks, by virtue of the statute, simply do not occupy a similar position.

786 F.2d at 626.

In sum, neither the general purpose of the FCUA nor the specific purpose of the common bond provision supports an inference that Congress arguably legislated against the competition now being challenged by the banks or that it otherwise intended that banks' interests be within the zone of interests to be protected. Indeed, as the Fourth Circuit stated, the most reasonable inference is directly to the contrary. If the D.C. Circuit had adhered faithfully to *Data Processing*, *ICI*, *Clarke* and *Air Courier*, it would have affirmed rather than reversed the district court.

II. The D.C. Circuit's Opinion Creates A Conflict In The Circuits

The second reason why certiorari should be granted is to resolve the conflict between the results reached by the D.C. Circuit in this case and by the Fourth

Circuit in *Branch Bank*. As stated above, *Branch Bank* and this case are identical in all relevant respects except the outcome.

The D.C. Circuit chose not to follow *Branch Bank* although it agreed with its conclusions concerning the overall purposes of the Act generally and of the common bond provision in particular. It also agreed with the Fourth Circuit that banks were not intended beneficiaries of the Act. However, it stated that it believed that the "subsequent explication of the suitable challenger route to standing in *Clarke*," 988 F.2d at 1277, n.3, App. 10a, n.3, provided an alternative basis for standing that the Fourth Circuit had not considered.

For the reasons discussed above, the Credit Unions assert that the D.C. Circuit has misinterpreted *Clarke*, created a new basis for standing where none was intended, and extended the reach of the prior competitor standing cases. Thus, *Clarke* did not "explicat[e] . . . the suitable challenger route to standing." The D.C. Circuit incorrectly distinguished *Branch Bank* from the instant case on this basis, and there is therefore a split in the circuits.

In addition, the D.C. Circuit was wrong in criticizing the Fourth Circuit's exclusive focus on the issue whether Congress intended that banks interests be protected under the FCUA. As stated above, this analysis is at the core of the zone of interests test. Indeed, the Fourth Circuit followed exactly the same approach that the Supreme Court utilized when it reversed the D.C. Circuit in *Air Courier*. Both focused exclusively on whether Congress intended to protect the interests of the plaintiffs who brought the action.

III. Important Questions Are Raised

This petition raises special and important questions for litigants generally and for credit unions in particular.

A. For Litigants Generally

Whether "zone of interest" standing exists is a consideration in many challenges to agency and other governmental action. Even if it is not clear that the D.C. Circuit misconstrued applicable Supreme Court precedents, it is apparent that substantial confusion exists with respect to the nature of the zone of interest test and that the law on this important issue requires clarification.

The D.C. Circuit has adopted an alternative test for zone of interest standing which it calls the "suitable challenger" route to standing. It eliminates a plaintiff's need to show any congressional intent to protect its interests. The D.C. Circuit bases this approach on the Supreme Court's decision in *Clarke*. It has continued to utilize this approach notwithstanding the fact that subsequently, in *Air Courier*, the Supreme Court ruled that plaintiffs did not have standing to sue absent a showing of congressional intent to protect their interests. Addressing this apparent conflict would assist other litigants and other courts.

B. For Credit Unions

The issues raised are particularly important to credit unions and their members.

In passing the Federal Credit Union Act in 1934 in the midst of the Great Depression, Congress was seeking to "make more available to people of small

means credit for provident purposes." Preamble to Federal Credit Union Act. Pub. L. 73-467, 48 Stat. 1217 (1934). Credit unions have continued to serve these goals, providing access to credit and a means of saving for millions of Americans.

The decision of the District of Columbia Circuit is likely to have a major impact on the ability of credit unions to continue to provide services to their members. If this decision is allowed to stand, banks will be permitted to challenge every amendment to every credit union's charter, since all charter amendments must comply with the common bond provision. In fact, within six weeks of the issuance of the D.C. Circuit's opinion, a group of banks filed suit against the NCUA in federal district court in Michigan, alleging that the charter amendments of a local credit union were void for failure to comply with the common bond provision. The resulting increase in the burdens on both credit unions and the NCUA is likely to be substantial.

Moreover, this decision will affect credit unions regardless of where they are located, since NCUA approvals can always be challenged in the District of Columbia Circuit. For these reasons, this decision, although it expresses the law of only one circuit, will affect the interests of credit unions nationwide.

CONCLUSION

For the reasons stated above, the Credit Unions submit that this case is a compelling one for Supreme Court review. The Credit Unions respectfully request that this Court grant their petition and review the decision in this case on writ of certiorari.

Respectfully submitted,

PAUL J. LAMBERT
(Counsel of Record)
TERESA BURKE
BINGHAM, DANA & GOULD
1550 M Street, N.W.
Suite 1200
Washington, D.C. 20005

Attorneys for Petitioners

June 21, 1993

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 91-5262, 91-5336

FIRST NATIONAL BANK AND TRUST COMPANY, et al.,
Appellants,

v.

NATIONAL CREDIT UNION ADMINISTRATION, et al.

FIRST NATIONAL BANK AND TRUST COMPANY, et al.,
Lexington State Bank,
Appellants,

v.

NATIONAL CREDIT UNION ADMINISTRATION

Argued Nov. 16, 1992

Decided April 2, 1993

---

* * * *

Michael S. Helfer, with whom William J. Kolasky, Jr., John J. Gill, and Michael F. Crotty, were on the brief, for appellants.

Jonathan R. Siegel, Atty., Dept. of Justice, with whom Stuart M. Gerson, Asst. Atty. Gen., Jay P. Stephens, U.S. Atty., and Douglas N. Letter, Atty., Dept. of Justice, were on the brief, for appellees.

Edward C. Winslow and William C. Scott were on the brief, for amicus curiae North Carolina Alliance of Community Financial Institutions.

Before: WALD, SILBERMAN, and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Concurring opinion filed by Circuit Judge WALD.

SILBERMAN, Circuit Judge:

Appellants, four North Carolina banks and the American Banking Association, challenged the National Credit Union Administration's (NCUA) approval of several recent applications by AT & T Family Federal Credit Union (AT & T Family) to expand its membership. According to appellants, the NCUA's decisions violated the requirement of the Federal Credit Union Act (FCUA) that membership in federal credit unions be limited to "groups having a common bond of occupation or association." 12 U.S.C. § 1759. The banks complain that, by allowing AT & T Family improperly to extend its membership and thereby its number of potential borrowing customers, the NCUA has made the credit union a formidable competitor. The district court applied the "zone of interests" tests for prudential standing and determined that appellants lacked standing to sue. Although we agree with the district court that the appellants were not intended beneficiaries of the FCUA, we think that they are suitable challengers because the statute arguably prohibits the competition of which they complain. This case thus falls within the rationale of *Clarke v. Securities Industry Association*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987), and *Investment Company Institute v. Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971). We reverse and remand to the district court.

I.

Passed in 1934 in the midst of the Great Depression, the FCUA, 12 U.S.C. §§ 1751-1795k (1988), was designed

to improve access to credit for people of "small means." S.REP. No. 555, 73d Cong., 2d Sess. 1 (934). For many working Americans, credit at reasonable rates had essentially disappeared in the years following the stock market crash. Lacking the security necessary to obtain loans from banks, working Americans turned to loan sharks who typically charged usurious interest rates, which was thought to reduce the overall purchasing power of American consumers. *See* 78 CONG.REC. 12,223 (1934). Congress saw the solution to this problem in a system of federal credit unions that would provide credit at reasonable rates and thus would help spur economic recovery. *See id.* at 7260, 12,223-25.

To ensure that credit unions fulfilled their purpose of meeting members' credit needs, Congress restricted credit unions' management and business activities. For example, a federal credit union is owned and controlled by its members, *see* 12 U.S.C. §§ 1757-1761, and it can make loans only to members or to other credit unions, *see id.* § 1757(5). Congress expected that such measures guaranteeing democratic self-government would infuse the credit union with a spirit of cooperative self-help and ensure that the credit union would remain responsive to its members' needs.

A related provision of the FCUA, the common bond requirement, is at the heart of this case. Section 109 of the Act restricts membership in federal credit unions to "groups having a common bond of occupation or association." 12 U.S.C. § 1759. For much of the Act's history, the NCUA interpreted this provision to require all members of a credit union to share the same bond. In the 1980s, however, the NCUA issued a series of Interpretive Ruling and Policy Statements (IRPS) construing the statute to allow a number of different groups, each having its own bond, to form a credit union, even though no overall common bond united the different groups. *See* 47 Fed.Reg. 26,808 (1982) (IRPS 82-3); 48 Fed.Reg. 22,899 (1983); 49 Fed.Reg. 46,536 (1984) (IRPS 84-1); 54 Fed.Reg. 31,165

(1989) (IRPS 89-1). The NCUA's most recent interpretation, IRPS 89-1, made clear that a credit union could comprise a "combination of distinct, definable occupational and/or associational groups." 54 Fed.Reg. 31,165, 31,170 (1989).

Appellants challenged several decisions in which the NCUA applied IRPS 89-1 to approve applications by AT & T Family to expand its field of membership. Until recently, AT & T Family's membership consisted primarily of employees of AT & T Technologies, Inc., AT & T Network Systems, and Bell Telephone Labs. In late 1989 and 1990, AT & T Family filed eight applications to extend its membership to include groups of employees from other companies such as the American Tobacco Company, Western Auto Supply Company, and WGHP-TV, to name but a few. In all, the NCUA approved the extension of AT & T Family's membership to 16 new employee groups. Appellants claimed before the agency and in the district court that IRPS 89-1, ignored the statutory language by allowing groups lacking any common bond between them to join together in a credit union. The banks contended that by allowing AT & T Family to expand to 71,000 members in violation of the statute, the NCUA has allowed the credit union, which is exempt from state and federal income taxes, *see* 12 U.S.C. § 1768, to become a formidable competitor to banks.

The district court granted NCUA's motion to dismiss for lack of standing. The court determined that appellants were not pressing claims "arguably within the zone of interests' protected by the FCUA. *See First Nat'l Bank & Trust Co. v. National Credit Union Admin.*, 772 F.Supp. 609, 611-13 (D.D.C. 1991). Relying on the language of this court's post-*Clarke* decisions on prudential standing,f *see, e.g., Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C.Cir. 1989) (*HWTC IV*); *Hazardous Waste Treatment Council v. United States Envtl. Protection Agency*, 861 F.2d 277 (D.C.Cir. 1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3157, 104 L.Ed.2d 1020 (1989) (*HWTC II*), the

district court said that "[t]hose not regulated by an agency have standing only if they are the intended beneficiaries of the specific statute or are nonetheless 'suitable challengers' to the statute, because their interests coincide with the interests which Congress did intend to protect." *First Nat'l Bank,* 772 F.Supp. at 611. The banks were not intended beneficiaries of the Act, thought the district court, because "the Act was passed to establish a place for credit unions within the country's financial market, and specifically not to protect the competitive interest of banks." *Id.* at 612; *see also Branch Bank & Trust Co. v. National Credit Union Admin. Bd.,* 786 F.2d 621 (4th Cir. 1986), *cert. denied,* 479 U.S. 1063, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987). Under applicable precedent, the district court believed that the banks were not suitable challengers either. Because the banks and the credit union competed for the same business, any coincidence in their interests "would be at best fortuitous." *First Nat'l Bank,* 772 F.Supp. at 612. The banks, according to the district court, could not rely on the Supreme Court's cases, *see, e.g., Clarke v. Securities Industry Ass'n,* 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987); *Investment Co. Inst. v. Camp,* 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971) (*ICI*); *Association of Data Processing Serv. Orgs. v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), that granted standing to competitors as suitable challengers because, unlike the competitors in those cases, the banks were not suing under an entry-restricting statute. *See First Nat'l Bank,* 772 F.Supp. at 613.

II.

It should be noted that no one questions appellants' Article III standing; that appellants will suffer competitive or economic injury is not in doubt. The question before us is whether under the FCUA the banks can claim prudential standing as well. In other words, are they pursuing an interest (not just an objective), *see HWTC IV,* 885 F.2d at

925,[1] arguably within the zone of interests Congress intended either to regulate or protect, and, thus, are they among the class of persons entitled to sue to enforce FCUA's restrictions? *See Clarke,* 479 U.S. at 396, 107 S.Ct. at 755; *Data Processing,* 397 U.S. at 153, 90 S.Ct. at 829. This "zone of interests" test ensures that standing is granted only to plaintiffs who will not distort congressional objectives. It excludes those plaintiffs whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke,* 479 U.S. at 399, 107 S.Ct. at 757. Because the banks are not regulated by the common bond requirement, we must inquire whether the banks can be thought to have been "protected" by that statutory limitation on the activities of credit unions. Litigants can qualify as "protected" by a statute if they are intended beneficiaries of the legislation or are nevertheless what we have termed suitable challengers, *see HWTC IV,* 885 F.2d at 923-24; that is, if their interests are sufficiently congruent with those of the intended beneficiaries that the litigants are not "more likely to frustrate than to further the statutory objectives." *Clarke,* 479 U.S. at 397 n. 12, 107 S.Ct. at 756 n. 12.

Appellants claim that they qualify both as intended beneficiaries and as suitable challengers under the FCUA. We agree with the district court, however, that Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdain. *See* 78 CONG.REC. 7259 (1934) (statement of Sen. Barkley) ("[B]ank[s] . . . cannot extend credit to many of

---

[1] In *HWTC IV,* we emphasized that "it is the interests that the challenger seeks to protect and not the challenge with which we must be concerned." *HWTC IV,* 885 F.2d at 925.

these people, because they do not have the required security."); *id.* at 12,225 (statement of Rep. Luce) (noting that credit unions would serve those "who do not use and cannot use banks . . . for small borrowings"). The common bond requirement, an existing characteristic of state credit unions, was designed, in combination with the restriction that permitted credit unions to loan only to members, to ensure that credit unions would effectively meet members' borrowing needs. It would seem, therefore, that Congress assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default. That is surely why it was thought that credit unions, unlike banks, could "loan on character." *See id.* at 12,223. The common bond was seen as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success.[2]

To be sure, as time passed—as credit unions flourished and competition among consumer lending institutions intensified—bankers began to see the common bond requirement as a desirable limitation on credit union expansion. To that end, in the 1970s bankers, according to appellants, became active in lobbying Congress to urge the maintenance of the common bond requirement. But that fact, assuming it is true, hardly serves to illuminate the intent of the Congress that first enacted the common bond requirement in 1934. And we find no indication that Congress was, at that earlier time, concerned about the competitive position of banks.

There remains, however, the more subtle question, whether banks can be thought suitable challengers to en-

---

[2] The Senate report on the bill praised credit unions for their record of successful service during the Depression, a record that contrasted sharply with a grim history of bank failures, and attributed the success largely to credit unions' self-government and attentiveness to members' needs. *See* SEN.REP. No. 555, 73d Cong., 2d Sess. 2-4 (1934).

force a requirement designed to benefit the members—particularly potential borrowers—of credit unions. Appellants rely on the Supreme Court's reasoning in *ICI* and *Clarke,* and it seems to us the parallels between those cases and the present one are striking. In *ICI* the securities industry challenged a ruling by the Comptroller of the Currency that would have permitted banks to slip the Glass-Steagall leash and enter what was considered a part of the securities business. *See ICI,* 401 U.S. at 618-19, 91 S.Ct. at 1092-93. As the Supreme Court later explained in *Clarke,* the Glass-Steagall Act, which limited the securities underwriting and investment activities of banks, was designed to protect bank depositors from risky bank activities—not to insulate investment bankers, or indeed, any noncommercial bankers, from competition. *See Clarke,* 479 U.S. at 398 & n. 13, 107 S.Ct. at 756 & n. 13. Nevertheless, because the investment bankers pursued interests congruent with those of the intended beneficiaries, they were permitted to sue in *ICI* to enforce Glass-Steagall's restrictions on banks.

Similarly, in *Clarke* the ever-vigilant securities industry was permitted to challenge a Comptroller decision that authorized a national bank to offer discount brokerage services not only at its established branches, but also at locations both inside and outside the bank's home state. The challenge was based on the McFadden Act, which restricts the interstate branching of national banks. *See Clarke,* 479 U.S. at 391, 107 S.Ct. at 752. The Act was designed to establish competitive equality between national and state banks and thus to protect smaller banks from competition from out-of-state leviathans, *see First Nat'l Bank v. Walker Bank & Trust Co.,* 385 U.S. 252, 261, 87 S.Ct. 492, 497, 17 L.Ed.2d 343 (1966), not to protect investment bankers. Nevertheless, the investment bankers had standing to sue. The Supreme Court relied on the correlative congressional objective of preventing national banks from gaining too much ("monopoly") control over credit and money through

"unlimited branching." *Clarke*, 479 U.S. at 402, 107 S.Ct. at 758. Given that general congressional purpose, the Court thought that the securities industry, which was a competitor at least with respect to discount brokerage services, was a suitable challenger. In other words, even though the Congress that passed the McFadden Act was not at all concerned with the spread of discount brokerage—only branch-banking—and the securities industry was a competitor with regard to the former, not the latter, it was nevertheless permitted to challenge the spread of discount brokerage through the McFadden Act, again because of the congruence of plaintiffs' interests with those of the intended beneficiaries.

We take from these cases the principle that a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect.[3] The limitations may be restrictions on entry—geographic or product line—or they might be, as in our case, limitations on growth, which are akin to entry restrictions. Like more classic entry restrictions, the common bond requirement, by limiting a credit union's customer base, effectively prevents the credit union from offering its services and competing in a broader market.

We previously have recognized the particular significance of statutory entry restrictions on prudential stand-

---

[3] We cannot agree with the pre-*Clarke* reasoning of *Branch Bank & Trust Co. v. National Credit Union Administration Board*, 786 F.2d 621 (4th Cir. 1986), in which the Fourth Circuit focused exclusively on the question whether banks' interests were intended to be protected under the FCUA and concluded that banks do not have standing under the FCUA, *see id.* at 626. The subsequent explication of the suitable challenger route to standing in *Clarke* empties the *Branch Bank* decision of its persuasiveness.

ing. In *HWTC II*, we distinguished the case before us from the Supreme Court's cases granting standing to competitors (*Data Processing, ICI,* and *Clarke*), on the grounds that it did not involve an "entry-restricting" statute. *See HWTC II,* 861 F.2d at 284. Similarly, in *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Administration,* 822 F.2d 1105 (D.C.Cir. 1987), we noted that "[c]ompetitors have a seemingly unbroken record of success in securing standing" in cases involving regulatory systems that "restrict[] entry into a particular field or transaction." *Id.* at 1109. Indeed, the district court attempted to distinguish this case from *ICI* and *Clarke* on the grounds that the common bond requirement was not an entry restriction.[4] *See First Nat'l Bank,* 772 F.Supp. at 613.

Appellees, sidestepping the entry-restriction cases, rely primarily on our refinement of prudential standing analysis in *HWTC IV.* In that case, an organization of companies that treated hazardous waste and marketed products derived from processed waste sued to force the EPA to adopt stricter environmental regulations on other companies so as to create a greater market for their own services and products. We held that HWTC's interests (irrespective of its particular objectives in the case before us) were not sufficiently congruent with those of the intended beneficiaries of the statute to make HWTC a suitable challenger. *See HWTC IV,* 885 F.2d at 924. The treatment firms' interest was in selling more services and equipment to the regulated companies, and therefore the firms would seek regulations that would increase demand for their product regardless of the effects on the statute's intended bene-

---

[4] We have expressed concern in the past about allowing potential plaintiffs to gain standing through a facile assertion that they are enforcing entry-restricting legislation (a concern that again highlights the importance we have implicitly attached to entry restrictions in standing cases). *See HWTC II,* 861 F.2d at 284. This, of course, is not such a case.

ficiaries. We concluded that to have standing under the statute, HWTC would have to have shown a systematic alignment of interests with the statute's beneficiaries, *see id.* at 924, a standard that appellees understandably claim was stricter than our prior characterization of *Clarke* as a test requiring "less than a showing of congressional intent to benefit but more than a marginal relationship to the statutory purposes." *HWTC II,* 861 F.2d at 283.

Our decision did not rest on a conclusion that the economic interests of the treatment first were somehow less deserving than the environmental interests the statute was designed to foster; nor was it based on a view that the firms' economic incentives were inherently less worthy than the economic objectives of the securities industry plaintiffs in *ICI* and *Clarke.* On the contrary, the economic motivations could be thought analogous. If the watchword of the treatment firms in *HWTC IV* was "treatment is good and more treatment is better," *HWTC IV,* 885 F.2d at 925, it might be said that the watchword of all competitors with regard to their potential rivals must be "regulation is good and more restrictive regulation is better." And one cannot base standing on one's mere status as an economic beneficiary of government regulation of others. In *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), the Supreme Court said:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Id. at 883, 110 S.Ct. at 3186.

The distinction between *HWTC IV* and the Supreme Court's *Lujan* hypothetical on the one hand and *ICI* and *Clarke* on the other must be that in *ICI* and *Clarke* the potentially limitless incentives of competitors were channelled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation dividing the banking and securities industries. The interests the securities industry plaintiffs sought to protect were thus less open-ended and more confined than were the economic interests pursued in *HWTC IV,* and as a result there was a reduced danger of distorting congressional purpose. By contrast, nothing in the statute in *HWTC IV* could ensure that there would be any connection at all between the treatment firms' interests and the statutory purpose. "[T]here is not the slightest reason to think that treatment firms' interest in getting more revenue by increasing the demand for their particular treatment services will serve [the statute's] purpose of protecting health and the environment." *HWTC IV,* 885 F.2d at 924. There is, however, a reason to think that a competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself reflects a congressional judgment that the constraint on competition is the means to secure the statutory end. The restriction connects the economic interests of competitors to the purposes of the statute and yet constrains competitors to a limited role in guarding a congressionally drawn boundary. In these circumstances the plaintiffs can be thought to have interests "systematically aligned" with those the statute is designed to benefit.

The securities industry plaintiffs in *ICI* and *Clarke* were not seeking to impose new regulations on banks in areas unrelated to an existing, specific statutory norm simply to provide a demand for their services or to weaken banks as competitors.[5] We certainly would not accept as a suit-

[5] Perhaps it is also relevant—in considering whether a plaintiff has

able plaintiff a party who had only a general economic interest in harming a competitor and who, accordingly, sought to impose some new, more onerous regulation upon that competitor. *See, e.g., Calumet Indus., Inc. v. Brock,* 807 F.2d 225, 228 (D.C.Cir. 1986). But, when the plaintiff seeks to enforce a statutory restriction on his competitor—a restriction the plaintiff enjoys as well as the statutory beneficiaries—there is a good deal less risk that recognizing the plaintiff's standing will lead to a misdirection of a statutory scheme.

Our reasoning in *HWTC* suggests that our reaction might be different if the banks appeared before us, not asking to patrol the common bond picket line, but seeking a new regulation that would squeeze the credit unions into a smaller market or even eliminate them from the market altogether. It is unnecessary, however, to extend our holding into a definitive answer to appellants' hypotheticals; we concede that the general issue is devilishly complex. We feel confident, however, that this case is a good deal closer to the paradigm of *ICI* and *Clarke* than it is to *HWTC,* and, therefore, we hold that appellants have standing. The judgment of the district court is reversed and the case remanded.

WALD, Circuit Judge, concurring:

The panel opinion's analysis of precedents on "entry-restricting" statutes quite correctly concludes that, under circuit case law, as well as under the Supreme Court's directives in *Clarke v. Securities Industry Association,* 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987), and *Investment Company Institute v. Camp,* 401 U.S. 617, 91

---

prudential standing, if not Article III standing, *see Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 227, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974)—to ask whether, as the Supreme Court may well have in *ICI,* one can be confident that the intended beneficiaries had sufficient incentive and organizational resources to sue. *See HWTC II,* 861 F.2d at 284.

S.Ct. 1091, 28 L.Ed.2d 367 (1971), plaintiff banks have standing to challenge the NCUA's interpretation of the common-bond requirement. I agree with my colleagues that, where an entry-restricting or analogous statute is involved, "a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may do so to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect." Panel opinion ("Panel op.") at 9.

I originally—and still—disagree, however, with the "suitable challenger" test articulated in *Hazardous Waste Treatment Council v. Thomas,* 885 F.2d 918 (1989) (*HWTC IV*), which requires a "systematic coincidence," *id.* at 924, or "systematic alignment," Panel op. at 10, 12, of interests between the would-be plaintiffs and the statute's intended beneficiaries. As I stated at the time, I find this test without roots either in Supreme Court law[1] or in the general purposes of standing. *See HWTC IV,* 885 F.2d at 927-34 (Wald, C.J., dissenting). I recognize, however, that this test is nonetheless part of our circuit law. In that context, I agree with the panel opinion that, when an entry-restricting or analogous statute "reflects a congressional judgment that the restraint on competition is the means to assure the statutory end," Panel op. at 11, and plaintiffs seek only to "enforce the statutory demarcation," *id.*, between the beneficiaries of a licensing scheme and their competitors, plaintiffs clearly satisfy the goal of the "suitable challenger" test, *i.e.,* to ensure that plaintiffs are

---

[1] It should be noted that, while the Supreme Court in *Clarke v. Securities Industry Association,* 479 U.S. 388, 107 F.Ct. 750, 93 L.Ed.2d 757 (1988), did determine that the securities industry was a "proper party" to challenge the Comptroller's decision to permit expanded bank activities, *id.* at 403, 107 S.Ct. at 759, it did so under its own "not . . . especially demanding" zone of interest test, *id.* at 399, 107 S.Ct. at 757, not under any "suitable challenger" test akin to that laid down in *HWTC IV.*

more likely to further than to frustrate the purpose of the statute. *See HWTC IV,* 885 F.2d at 925; *see also Clarke v. Securities Industry Ass'n,* 479 U.S. at 397 n. 12, 107 S.Ct. at 756 n. 12 (citing this as purpose of "zone of interest" test).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 90-2948 SSH

FIRST NATIONAL BANK AND TRUST COMPANY, Piedmont State Bank, Lexington State Bank, Randolph Bank and Trust Company, Bankers Trust of North Carolina, and American Bankers Association,
Plaintiffs,

v.

NATIONAL CREDIT UNION ADMINISTRATION,
Defendant,

and

AT & T Family Federal Credit Union and Credit Union National Association, Inc.,
Defendants-Intervenors.

Aug. 9, 1991

Michael S. Helfer, William J. Kolasky, Jr., Lance W. Edwards, John J. Gill and Michael F. Crotty, Washington, D.C., for plaintiffs.

Vaughn Finn and Theodore C. Hirt, Washington, D.C., for defendant.

Paul Joseph Lambert, Washington, D.C., for defendants-intervenors.

OPINION

STANLEY S. HARRIS, District Judge.

Plaintiffs, five North Carolina banks and the American Bankers Association, challenge decisions by the National Credit Union Administration (NCUA) approving amendments to the charter of the AT & T Family Federal Credit Union (AT & T Family) expanding its field of membership. They allege that when the NCUA approved the amendments, it acted arbitrarily and capriciously, and violated the statutory requirement under the Federal Credit Union Act, 12 U.S.C. § 1751 *et seq.* (FCUA), that there be a "common bond of occupation or association" among the members of a federal credit union association. Pursuant to 5 U.S.C. § 706 and 28 U.S.C. §§ 2201 and 2202, they ask that various NCUA approvals of applications by AT & T Family be declared null and void and that defendant be enjoined from approving similar amendments to AT & T Family's charter. Now before the court are defendant's motion to dismiss for lack of standing and plaintiffs' opposition thereto. For the reasons set forth below, defendant's motion is granted, and the case is dismissed.

BACKGROUND

The Federal Credit Union Act was passed in 1934, in the wake of the Great Depression. After the crash, access to credit had been virtually eliminated for the great majority of the working class: most potential borrowers lacked the security to acquire a loan from a bank, and other licensed money lenders were able to charge extremely high interest rates. S.Rep. No. 555, 73d Cong., 2d Sess. 3 (1934); *see also* 78 Cong.Rec. 7259 (1934). Without access to credit, the nation's lower and middle classes saw their buying power spiral downward. S.Rep. No. 555 at 3.

The establishment of national credit unions, modelled after state supported organizations which had thrived through the economic chaos of the Depression, was seen as a "happy medium" between the loan shark and the bank. 78 Cong.Rec. 7259 (1934). Congress expected that members of credit unions, "with their own money and

under their own management," would be able to solve their own credit difficulties. S.Rep. No. 555 at 2. It was hoped that with access to small amounts of funds at reasonable interest rates, national credit unions would return significant buying power to those otherwise unable to have it. *Id.* at 1. Though state-sponsored credit unions fulfilled this need in some areas, Congress felt that the nation would benefit from a federal system because it would be capable of rapid expansion and would permit the creation of credit unions in states that did not previously authorize them. *Id.* at 2, 3.

The credit union is distinctive in that it is the members who own and control the organization. Members purchase shares in the credit union and exercise control over it, democratically, irrespective of the number of shares held. 12 U.S.C. §§ 1757(6), 1760 (1988). Loans may be made only to members of the organization or to other credit unions. § 1757(5). Each credit union is managed by a board of directors elected annually by and from the members, and no member of the board receives any compensation for these services. § 1761. Supervision and chartering of credit unions is entrusted to the Board of the National Credit Union Administration (NCUA), a three-member panel appointed by the President upon the advice and consent of the Senate. §§ 1752a, 1754, 1756.

At issue in this case is § 109 of the FCUA, now codified at 12 U.S.C. § 1759, which provides that members of a credit union must share "a common bond" of occupation, association, or location. The NCUA has defined a common bond as:

> the sharing of some unifying factor or characteristic among persons that simultaneously links them together and distinguishes them from the general public. This unifying factor must be something more than an unfocused, generalized agreement on a given topic, or

a common belief or philosophy on matters of general concern.

45 Fed.Reg. 8285 (1980).

In recent years the NCUA has interpreted the common bond requirement to allow a number of occupational or associational groups to form a credit union if each group shares its own common bond. *See* 12 C.F.R. § 701.1 (1991); 54 Fed.Reg. 31,169 (1989). Plaintiffs challenge decisions by the NCUA approving applications by AT & T Family to expand its membership to include employee groups that have a separate common bond from the AT & T employee group. Defendant moves to dismiss for lack of standing to sue under its FCUA, and is joined in that motion by intervenors AT & T Family and Credit Union National Association, Inc.

DISCUSSION

The Administrative Procedure Act (APA) grants standing to anyone "adversely affected by agency action within the meaning of the relevant statute."[1] 5 U.S.C. § 702. In *Association of Data Processing Service Organizations v. Camp*, the Supreme Court explained that a party meets this standard if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in ques-

---

[1] In order to bring their claim, plaintiffs must show that they have both constitutional and prudential standing. *See National Federation of Federal Employees v. Cheney*, 883 F.2d 1038, 1041 (D.C.Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3214, 110 L.Ed.2d 662 (1990). To establish constitutional standing, a plaintiff must allege an injury-in-fact which is fairly traceable to the conduct complained of and likely to be redressed by the relief requested. *See Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Because the court dismisses the amended complaint for lack of prudential standing, it need not address the issue of Article III standing.

tion." 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Since *Data Processing,* the "zone of interests" test has been the standard by which the Court has judged questions of standing under § 702 of the APA.

The Court clarified what it means for a complainant to be within the "zone of interests" of a statute in *Clarke v. Securities Industry Ass'n,* 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). The ultimate inquiry, it asserted, is centered upon congressional intent. *Id.* at 399, 107 S.Ct. at 757. In view of Congress's evident intent to make agency action presumptively reviewable, a plaintiff has standing only if Congress intended for that particular class of plaintiffs to be relied upon to challenge agency action allegedly in disregard of the law. *Id.* The goal of the test is to exclude those plaintiffs who are more likely to frustrate than to further statutory objectives. *Id.* at 397, n. 12, 107 S.Ct. at 756, n. 12. In cases where a party is the subject of the contested regulation, it is clear that Congress intends for that party to be able to act as a "private attorney general" through bringing a suit to enforce the statute. *Id.* at 399, 107 S.Ct. at 757. But when not the subject of the statute, a party will be denied review if its interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be presumed that Congress intended to permit the suit." *Id.* at 399-400, 107 S.Ct. at 757.

Though the test is not meant to be especially demanding and there need be no explicit indication of congressional purpose to permit the suit, there are occasions where the requisite congressional intent is not present. *Id.* The Curt provided a hypothetical example of such a case in *Lujan v. National Wildlife Federation,* ___ U.S. ___, 110 S.Ct. 3177, 3186, 111 L.Ed.2d 695 (1990:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company

> that has the contract to record and transcribe the agency's proceedings' but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Such a company certainly would have Article III standing because it would have suffered an injury-in-fact which is fairly traceable to the agency action, but it would not meet the heightened requirement of prudential standing as defined by the APA. It simply is not the type of challenge which Congress would have imagined when it passed the statute. *See also Air Courier Conference of America v. American Postal Workers Union, AFL-CIO,* ___ U.S. ___, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991) (union representing Postal employees does not have standing to challenge the Postal Service's suspension of a statute designed to preserve adequate revenues for the Service.).

The D.C. Circuit has had occasion to clarify this standard further. Those not regulated by an agency have standing only if they are the intended beneficiaries of the specific statute or are nonetheless "suitable challengers" to the statute because their interests coincide with the interests which Congress did intend to protect. *Hazardous Waste Treatment Council v. Thomas,* 885 F.2d 918, 924 (D.C.Cir. 1989) (*HWTC IV*). A party is a suitable challenger if its interests coincide systematically, and not simply fortuitously, with the interests of those whom Congress intended to protect. *Id.; Hazardous Waste Treatment Council v. United States Environmental Protection Agency,* 861 F.2d 277, 283 (D.C.Cir. 1988), *cert. denied.* 490 U.S. 1106, 109 S.Ct. 3157, 104 L.Ed.2d 1020 (1989) (*HWTC II*).

The legislative history of the FCUA makes it clear that the Act was passed to establish a place for credit unions within the country's financial market, and specifically not to protect the competitive interest of banks. As noted,

credit unions were seen as a "happy *medium*" *between* the loan shark and the bank at a time when neither could satisfy the normal credit needs of the working class. 78 Cong.Rec. 7259 (1934). Further, Congress concluded that commercial banks were not in a position to make funds available to those of small means who generally had no security for loans. *Id.* Against this backdrop, it would defy logic to assume that Congress, in passing the FCUA, wanted to protect the interest of banks.

Nor was the common bond requirement included in the Act to protect banks. Instead, it was designed to ensure that credit unions remain responsive to those they were designed to serve. A major selling point for the FCUA was the outstanding record of state credit unions through the Depression, a record which was attributed to their democratic control, honest management, and faithful service to members. Sen.Rep. No. 555 at 2. It was largely through its limitation of membership to those with a common bond that credit unions were thought to fulfill this democratic ideal. *Barany v. Butler,* 670 F.2d 726, 734 (7th Cir. 1982); *La Caisse Populaire Ste. Marie v. United States,* 563 F.2d 505, 509 (1st Cir. 1977). Such an arrangement was supposed to make credit unions "incapable of exploitation." Sen.Rep. No. 555 at 3. For their part, plaintiffs can cite nothing in the legislative history of the FCUA to buttress their assertion that the common bond requirement was designed to protect banks.[2]

---

[2] Plaintiffs point only to a statement made during a hearing regarding a credit union authorization for the District of Columbia two years before the FCUA to support their argument. *See* Plaintiff's Motion of Points and Authorities in Opposition to Defendant's Motion to Dismiss at 12. The speaker mentioned in passing that amendments to the D.C. bill had been proposed after considering the suggestions of the Bankers' Association of the District of Columbia. Even if this court were to accept the legislative history of the D.C. statute as evidence of congressional intent with regard to the federal statute, it is hardly convincing evidence that Congress was trying to protect the interests of com-

Having shown that Congress did not have in mind the competitive interests of banks when it enacted the common bond requirement, it is a short step to conclude that neither are banks suitable challengers to actions taken under the authority of the FCUA. As this case shows, the interests of banks will rarely if ever coincide with those of credit unions, the interest which Congress did intend to protect, because both compete for the same business. Any coincidence of interest would be at least fortuitous. Thus, because they are neither intended beneficiaries nor suitable challengers, commercial banks are not within the zone of interests which Congress intended to protect when it passed the FCUA.

This position is in keeping the D.C. Circuit decisions on the subject of prudential standing In *HWTC IV* and *HWTC II,* the court found no standing for waste treatment companies which suffered competitive injury and challenged the regulatory structure for the safe treatment, storage, and disposal of hazardous wastes. Because those regulations were designed to protect human health and the environment and not to improve the business opportunities of waste treatment companies, the court was unwilling to infer that Congress intended for such companies to be able to challenge the regulations. *HWTC IV,* 885 F.2d at 924; *HWTC II,* 861 F.2d at 283. Nor did their interests coincide with the interests Congress intended to protect to the point at which they could nonetheless be seen as "suitable challengers" to the regulations. *HWTC IV,* 885 F.2d at 924; *HWTC II,* 861 F.2d at 283. In either case, the fact that firms are benefitted by congressional action, like the court reporters in *Lujan v. National Wildlife Federation* and like the commercial banks in this case, does not mean that an agency decision with regard to that decision con-

---

mercial banks when it enacted the common bond requirement. In fact, the passage cited emphasizes that the primary concern in authorizing credit unions was that they be successful.

fers standing. *Id.; see also National Federation of Federal Employees v. Cheney,* 883 F.2d 1038 (D.C.Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 3214, 110 L.Ed.2d 662 (1990) (organization of federal employees lacks standing to contest the Army's decision to contract out certain services as violative of statutes designed to coordinate budgeting procedures and increase efficiency in government operations.).

The Fourth Circuit reached the same conclusion when presented with facts virtually identical to these. In *Branch Bank & Trust C. v. National Credit Union Administration,* 786 F.2d 621 (4th Cir. 1986), *cert. denied,* 479 U.S. 1063, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987), the court found no standing for banks to challenge application of the common bond requirement:

> [T]he general purposes of the Act, rather than indicating a desire to protect banks, instead suggest that competitive interests of banks were purposely sacrificed by Congress to the interests of facilitating credit for people of limited personal means. . . . [T]he common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks.

Id. at 626.

Given this specific rationale for the common bond requirement, the court was unwilling to attribute to it a meaning at odds with the general goals of the statute. *Id.* This court shares the Fourth Circuit's basic conclusion.

Plaintiffs erroneously rely on a string of cases in which the Supreme Court has found standing where a group or business has suffered a competitive injury due to agency action. *See Clarke,* 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987); *Data Processing,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *Arnold Tours, Inc. v. Camp,* 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970); *Investment*

Co. Institute v. Camp, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971). Contrary to plaintiffs' assertion, all of these cases involve statutes directed at restricting entry into a given field or business. Even in *Clarke,* where a trade association representing securities brokers asserted that a decision to allow two national banks to open a discount brokerage operation violated anti-branching laws, the Court found standing because the statute was passed in part due to congressional fear that national banks might obtain monopoly control of credit and money if permitted to branch unrestricted. 479 U.S. at 402, 107 S.Ct. at 758. Because those plaintiffs' members competed with banks in providing discount brokerage services, the Court found that Congress arguably had legislated against the competition that plaintiffs sought to challenge. *Id.* at 403, 107 S.Ct. at 759. This intent to restrict entry was what made plaintiffs "very reasonable candidates to seek review." *Id.* As noted, Congress had no such intent when it passed the FCUA.

CONCLUSION

For these reasons, the court finds that plaintiffs lack prudential standing to challenge the action of the NCUA. Accordingly, defendant's motion to dismiss is granted and the case is dismissed.

No. 92-2010 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
SEP 1 1993
OFFICE OF THE CLERK

AT&T FAMILY FEDERAL CREDIT UNION AND CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF OF NONFEDERAL RESPONDENTS IN OPPOSITION

MICHAEL S. HELFER
Counsel of Record
LOUIS R. COHEN
LANCE W. EDWARDS
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Nonfederal Respondents

JOHN J. GILL III
MICHAEL F. CROTTY
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 663-5026

Of Counsel

September 1, 1993

BEST AVAILABLE COPY

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

22 pp

QUESTION PRESENTED

Whether banks (and their trade association) that compete for customers and business against AT&T Family Federal Credit Union have standing to challenge decisions of the National Credit Union Administration permitting AT&T Family Federal Credit Union to expand its membership in violation of the express "common bond" requirement of the Federal Credit Union Act?

LIST OF PARTIES

The parties below were as follows:

The First National Bank and Trust Company, plaintiff in the district court and appellant below, is a nationally chartered bank headquartered in Asheboro, North Carolina.

Lexington State Bank, plaintiff in the district court and appellant below, is a state chartered bank headquartered in Lexington, North Carolina.

Randolph Bank and Trust Company, plaintiff in the district court and appellant below, is a state chartered bank headquartered in Asheboro, North Carolina.

Bankers Trust of North Carolina, plaintiff in the district court and appellant below, is a state chartered bank headquartered in Greensboro, North Carolina.

Piedmont State Bank, plaintiff in the district court and appellant below, formerly a state chartered bank headquartered in Greensboro, North Carolina, merged with Bankers Trust of North Carolina on July 15, 1992, and no longer exists as a legal entity. Bankers Trust of North Carolina is the surviving entity.

American Bankers Association, plaintiff in the district court and appellant below, is a trade association for the commercial banking industry.[1]

---

[1] Pursuant to Rule 29.1, the nonfederal respondents' listing of parent companies and subsidiaries (except wholly-owned subsidiaries) is as follows:

The parent company of respondent First National Bank and Trust Company is FNB Corp. The parent company of respondent Lexington State Bank is LSB Bancshares, Inc. Respondent Randolph Bank and Trust Company has no parent; Corporate Data

Petitioners AT&T Family Federal Credit Union and Credit Union National Association, Inc., were permitted to intervene as defendants in the district court and were appellees below.

The North Carolina Alliance of Community Financial Institutions, a trade association representing community financial institutions in North Carolina, filed a brief amicus curiae below, urging reversal of the decision of the district court's judgment.

The National Credit Union Administration, defendant in the district court and appellee below, is the agency charged with the administration and enforcement of the Federal Credit Union Act.

Services, Inc. is its only subsidiary (other than wholly-owned subsidiaries). The parent company of respondent Bankers Trust of North Carolina is BTNC Corp.; DataBank, Inc. is its only subsidiary (other than wholly-owned subsidiaries). Respondent American Bankers Association has no parent companies or subsidiaries (other than wholly-owned subsidiaries).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTES AND REGULATIONS	2
STATEMENT	2
ARGUMENT	6
I. THE COURT OF APPEALS' DECISION WAS A STRAIGHTFORWARD AND CORRECT APPLICATION OF THE COMPETITOR STANDING DECISIONS OF THIS COURT.	6
II. THERE IS NO REASON TO GRANT CERTIORARI.	10
CONCLUSION	12
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Air Courier Conference of America v. American Postal Workers Union, AFL-CIO, 498 U.S. 518 (1990)	9
Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970)	6
Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970)	6
Branch Bank & Trust Co. v. NCUA, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987)	10,11
Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987)	*passim*
Community First Bank v. NCUA, No. 5:93-cv-59 (W.D. Mich. June 25, 1993)	11
Control Data Corp. v. Baldridge, 655 F.2d 283 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981)	11
First National Bank & Trust Co. v. NCUA, 988 F.2d 1272 (D.C. Cir. 1993)	1
First National Bank & Trust Co. v. NCUA, 772 F. Supp. 609 (D.D.C. 1991), *reversed*, 988 F.2d 1272 (D.C. Cir. 1993)	1
Investment Co. Institute v. Camp, 401 U.S. 617 (1971)	*passim*

STATUTES:	
5 U.S.C. § 702	2
12 U.S.C. § 24 (Seventh)	7
12 U.S.C. § 36	8
12 U.S.C. § 81	8
12 U.S.C. § 378(a)	7
12 U.S.C. § 1753(5)	4
12 U.S.C. § 1754	4
12 U.S.C. § 1757(5)	3

Table of Authorities Continued

	Page
12 U.S.C. § 1759	2,3,8
12 U.S.C. § 1768	3
28 U.S.C. § 1254(1)	2
RULES AND REGULATIONS:	
Organization and Operations of Federal Credit Unions; Charter-Related Activities, Interpretive Ruling and Policy Statement 89-1—Chartering and Field of Membership Policy, 54 Fed. Reg. 31,165 (NCUA 1989)	2,4
OTHER MATERIAL:	
NCUA, Region III Div. of Ins. Field of Membership Checklist re AT&T Credit (July 31, 1990)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-2010

AT&T FAMILY FEDERAL CREDIT UNION AND CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

---

BRIEF OF NONFEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, is reported at 988 F.2d 1272. The opinion of the district court, Pet. App. 16a-25a, is reported at 772 F. Supp. 609.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1993. The petition for a writ of certiorari

was filed on June 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

The relevant portions of the texts of the following statutes and regulations are set forth in the Appendix, *see* App. 1a-2a:

1. The Administrative Procedure Act, 5 U.S.C. § 702.
2. The "common bond" limitation of the Federal Credit Union Act, 12 U.S.C. § 1759.
3. Interpretive Ruling & Policy Statement 89-1—Chartering and Field of Membership Policy, 54 Fed. Reg. 31,165 (NCUA 1989).

STATEMENT

This case involves a straightforward application of decisions of this Court under which competitors of a regulated entity have standing to challenge regulatory action that permits the regulated entity to expand beyond the bounds set by Congress. *E.g.*, *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) ("ICI").

Plaintiffs are banks (and their trade association) that compete for business against a large, multi-state credit union called AT&T Family Federal Credit Union ("AT&T Credit"). On the merits—which have not yet been reached—the issue is whether the approval by the National Credit Union Administration ("NCUA") of numerous expansions of AT&T Credit's "field of membership" violated the "common bond" restriction in the Federal Credit Union Act ("FCUA").

The district court dismissed the complaint for lack of standing. The D.C. Circuit reversed in a unanimous decision (Judges Wald, Silberman and D.H. Ginsburg) based on *Clarke* and other competitor standing decisions of this Court. Certiorari has been sought solely by intervenor AT&T Credit and its trade association. The Solicitor General, representing defendant NCUA, has not sought certiorari.

Background. Credit unions take federally insured deposits from and make consumer and mortgage loans to their members. These activities compete with banks. Congress granted credit unions specific competitive advantages as compared to banks: for example, credit unions are tax-exempt, 12 U.S.C. § 1768, and are not restricted by the geographic limitations on branch banking. But Congress also specifically limited membership in a federal credit union to "groups having a common bond of occupation or association." 12 U.S.C. § 1759. The "common bond" limitation constrains the competitive scope of every federal credit union, because a credit union can generally take deposits from and make loans only to its members. 12 U.S.C. § 1757(5), (6).

Until recently, AT&T Credit's field of membership was limited to a small number of related employees. In recent years, however, AT&T Credit has requested approval by the NCUA of the addition to its field of membership of numerous employee groups spread over a wide geographic area who admittedly have *no* "common bond" with the core AT&T employee groups or to one another.[2] NCUA's current chartering policy

[2] Before a credit union may begin operating it must submit an "organization certificate" to the National Credit Union

permits a federal credit union to "consist of a combination of distinct, definable occupational and/or associational groups", even though the result is a credit union whose members do not share a single "common bond." *Interpretive Ruling and Policy Statement 89-1—Chartering and Field of Membership Policy*, 54 Fed. Reg. 31,165, 31,170 (NCUA 1989), App. 2a. Following this policy, the NCUA has approved almost all of AT&T Credit's proposals to add new members who have no relationship to the existing members, and has not denied any such proposal based on the "common bond" requirement. Through these licensing decisions, we contend, the NCUA has essentially nullified the statutory common bond requirement.[3]

This Lawsuit. AT&T Credit's size and tax-exemption make it a formidable competitor, and it takes customers and business away from the banks that have to compete against it. Accordingly, five local banks that compete against AT&T Credit and their trade association brought this action against the NCUA challenging the NCUA's interpretation of the

---

Administration stating, *inter alia*, "the proposed field of membership, specified in detail." 12 U.S.C. § 1753(5). A credit union may not begin operating until its organization certificate has been approved by the NCUA. 12 U.S.C. § 1754. Any amendment to a credit union's organization certificate, including to its field of membership, likewise requires NCUA approval. *See* 12 U.S.C. §§ 1753, 1754.

[3] AT&T Credit has enjoyed exponential membership growth in recent years. AT&T Credit has over 60,000 members and has assets in excess of $237 million. NCUA, Region III Div. of Ins. Field of Membership Checklist re AT&T Credit (July 31, 1990) (attached as Exhibit 11 to the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment filed February 5, 1991 in the district court).

common bond requirement and NCUA's decisions to permit AT&T Credit to expand its field of membership to include persons who do not have a common bond with one another.

The district court dismissed the complaint without reaching the merits. It held that the banks and their trade association did not have "prudential" standing to challenge NCUA's unlawful actions. Pet. App. at 25a.[4]

The court of appeals reversed and remanded for further proceedings in a unanimous decision. It noted that the common bond provision was designed to protect credit union members by ensuring that those making lending decisions would be familiar with the borrowers, with whom they had a common bond, and borrowers would in turn be reluctant to default. The plaintiff banks, said the court, have standing as competitors to maintain the action because the interest they are pursuing—confining credit union membership to those sharing a common bond—is congruent with the interests protected by the common bond requirement. Pet. App. at 9a, 12a-13a.

The court of appeals' conclusion that plaintiffs have standing flowed inevitably from its review of *ICI* and *Clarke*. Indeed, it said, "the parallels between those cases and the present one are striking." Pet. App. at 8a. *ICI* and *Clarke*, the court of appeals concluded, establish that "a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even

---

[4] The banks' constitutional standing is not at issue. *See* Pet. App. at 19a n.1, 5a.

if the plaintiff's interest is not precisely the one that Congress sought to protect." Pet. App. at 9a. Applying that principle here, the court found that the common bond requirement "limit[ed] a credit union's customer base," just like the "entry restrictions" involved in *ICI* and *Clarke*. *Id.* Therefore, the plaintiff banks (and their trade association) as competitors of AT&T Credit injured by the expansion of AT&T Credit in violation of the statutory limitation had standing to challenge the NCUA's actions. Pet. App. at 12a-13a.

ARGUMENT

I. THE COURT OF APPEALS' DECISION WAS A STRAIGHTFORWARD AND CORRECT APPLICATION OF THE COMPETITOR STANDING DECISIONS OF THIS COURT.

The Administrative Procedure Act grants standing to persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Under *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970) ("*ADPSO*"), a party meets this standard if "apart from the 'case' or 'controversy' test, . . . the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." Applying the "zone of interests" test, this Court has squarely and repeatedly held that competitors have standing to enforce statutory limitations on the scope of the activities of regulated entities. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970). Indeed, in *ADPSO* itself, the Court held that data processors "as competitors

of national banks" had standing to challenge a decision of the Comptroller of the Currency permitting national banks to provide data processing services, allegedly in violation of limits prescribed in the banking laws. 397 U.S. at 157.

The court of appeals correctly applied these decisions to the present case. Banks compete for business with credit unions, and the plaintiff banks lost business when AT&T Credit was permitted to expand its membership to persons who have no common bond with its existing members. As competitors of the regulated entity the plaintiff banks and their trade association have standing to challenge as unlawful the decisions of the NCUA that have resulted in competitive injury.

As the court of appeals found, "the parallels between [the *ICI* and *Clarke*] cases and the present one are striking." Pet. App. at 8a. In *ICI*, an association of mutual fund companies challenged the Comptroller of the Currency's approval of First National City Bank's application to establish and operate a collective investment fund for managing agency accounts. ICI's challenge was based on the Glass-Steagall Act, which benefited banks by prohibiting securities firms from taking deposits, but which also contained a limitation on the securities activities of banks. 12 U.S.C. §§ 24 (Seventh), 378(a). The Court held that mutual fund providers had standing to sue the Comptroller to enforce a limitation on the extent to which banks could enter the investment company business. 401 U.S. at 620-21. Here, similarly, the banks have standing because, as the court of appeals said, the common bond requirement in the FCUA limits "a credit union's

customer base" and thus the extent to which it may lawfully compete with banks. Pet. App. at 9a.

Clarke involved a challenge by investment firms to a decision of the Comptroller permitting banks to establish discount brokerage offices anywhere in the country, notwithstanding the limitations on branch banking in the McFadden Act, 12 U.S.C. §§ 36, 81. That Act, of course, "was designed . . . to protect smaller banks from competition from out-of-state leviathans, not to protect investment bankers." Pet. App. at 8a (citation omitted). Nonetheless, this Court held that the investment firms in *Clarke*, as competitors injured by the Comptroller's decision, had standing to sue the Comptroller for permitting banks to open out-of-state offices that allegedly violated the McFadden Act. 479 U.S. at 403.

Clarke is indistinguishable from the present case. Like the branch banking limits at issue in *Clarke*, the statutory common bond requirement at issue here restricts the extent to which the regulated entity may expand the marketplace for its services. Like the securities firms who were the plaintiffs in *Clarke*, the banks who are the plaintiffs here compete with the regulated entity and are injured by the regulatory decision they brought suit to challenge. And, contrary to AT&T Credit's bald assertion, Pet. at 11, it is just as clear here as it was in *Clarke* that Congress intended "to limit the competitive reach of the regulated entit[y]." The FCUA expressly states that the membership (and thus the customers) of every federal credit union "*shall be limited*" to those having a common bond with one another. 12 U.S.C. § 1759 (emphasis added).

AT&T Credit's principal argument (Pet. at 7) is that a competitor has standing only if it can show that Congress had an "intent to benefit" the plaintiff. But nothing in this Court's decisions requires a court to look beyond the limitations imposed by the statutory language to search for subjective congressional motivations. To the contrary, this Court rejected exactly this argument in *Clarke* when it pointed out that in *ICI* and the other competitor standing cases

> there was no evidence that Congress had intended to benefit the plaintiff's class [*e.g.*, mutual fund providers in *ICI*] when it limited the activities permitted national banks. . . . [I]t was enough to provide standing that Congress, for its own reasons . . . had forbidden banks to compete with plaintiffs by entering the investment company business.

479 U.S. at 398.

The Court went on in *Clarke* to summarize the "zone of interest" test as *not* requiring any "indication of congressional purpose to benefit the would-be plaintiff." 479 U.S. at 399-400.[5]

This Court's decision in *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517 (1991), is fully consistent with the court of appeals' decision. *Air Courier* was not a

---

[5] AT&T Credit wrongly suggests that the D.C. Circuit recognized that the general purpose of the FCUA was to encourage the "growth" of credit unions. Pet. at 13. The court actually stated that Congress' purpose was to encourage the "proliferation" of credit unions. Pet. App. at 6a. The *proliferation* of credit unions, of course, will be a natural byproduct of the enforcement of the common bond requirement.

competitor standing case at all; rather, it involved the question whether a union had standing to sue the Postal Service for adopting a rule that the union claimed was unlawful and reduced employment opportunities for the union's members. There is no indication that this Court by reviewing carefully the language and purpose and history of the Private Express Statute intended in any way to overrule or modify the competitor standing cases or engraft onto them a requirement that a competitor show a subjective congressional intent to confer standing on it (*see* Pet. at 9). To the contrary, *Air Courier* expressly stated that "*Clarke* is the most recent in a series of cases in which we have held that *competitors of regulated entities have standing to challenge regulations.*" 498 U.S. at 529 (emphasis added). That is exactly what the D.C. Circuit here held.

II. THERE IS NO REASON TO GRANT CERTIORARI

The Solicitor General has not sought certiorari on behalf of defendant NCUA. None of intervenor AT&T Credit's remaining arguments justify granting certiorari.

1. There is no conflict in the circuits requiring resolution by this Court. The Fourth Circuit did hold in *Branch Bank & Trust Co. v. NCUA*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), that a bank did not have standing to challenge a decision of the NCUA approving expansion of a credit union in violation of the common bond requirement. But that case was decided before *Clarke*, and, as the D.C. Circuit said, Pet. App. at 9a n.3, *Branch Bank* cannot survive *Clarke*. *Branch Bank* was part of a line of cases that limited standing to express beneficiaries of a statutory restriction. This whole line of

cases—including a D.C. Circuit case, *Control Data Corp. v. Baldridge*, 655 F.2d 283, *cert. denied*, 454 U.S. 881 (1981), that the Fourth Circuit cited in *Branch Bank*, 786 F.2d at 625—was expressly overruled in *Clarke*. 479 U.S. at 400 n.15. And, as noted above, *Clarke* was quite explicit that, contrary to what the Fourth Circuit had held in *Branch Bank*, "there need be no indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 399-400.

The Fourth Circuit has not cited *Branch Bank* since *Clarke* was decided, nor has it had occasion to consider whether in light of *Clarke* it would now follow or reject the D.C. Circuit's decision in the instant case. Under these circumstances, and given the clarity of the holding in *Clarke* and its effect on *Branch Bank*, there is no reason to believe there is a live conflict in the circuits.

2. There is no "confusion" in the courts about the application of *ICI*, *Clarke*, and the other competitor standing cases, either in general or as applied to suits against the NCUA in particular. Indeed, AT&T Credit does not cite a single post-*Clarke* case in which a competitor has been denied standing to challenge agency action expanding the authority of a regulated entity.[6]

3. The prediction of disruption of NCUA's programs, Pet. at 16-17, is no reason to grant certiorari.

---

[6] In the one "common bond" case of which we are aware since the D.C. Circuit decision here, a district court in Michigan held that the plaintiff banks *did* have standing to sue the NCUA, following the D.C. Circuit and rejecting the NCUA's reliance on the Fourth Circuit's decision in *Branch Bank*. *Community First Bank v. NCUA*, No. 5:93-cv-59, slip op. at 7-8 (W.D. Mich. June 25, 1993).

Other federal agencies—including the banking agencies such as the Comptroller of the Currency, which was the defendant in *ADPSO*, *ICI*, and *Clarke*, among others—face the possibility of competitor standing suits without any evidence that their ability to carry out their regulatory responsibilities has been impaired. NCUA is certainly capable of doing the same thing.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL S. HELFER
Counsel of Record
LOUIS R. COHEN
LANCE W. EDWARDS
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Nonfederal Respondents

JOHN J. GILL III
MICHAEL F. CROTTY
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 663-5026

Of Counsel

September 1, 1993

APPENDIX

APPENDIX

5 U.S.C. § 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

12 U.S.C. § 1759:

Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

Shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, but no joint tenant shall be permitted to vote, obtain loans, or hold office, unless he is within the field of membership and is a qualified member.

54 Fed. Reg. 31,165, 31,170 (1989):

4. *Multiple-Group Charters.* NCUA may charter a Federal credit union to serve a combination of distinct, definable occupational and/or associational groups. However, NCUA will not charter as a single Federal credit union multiple groups which include one based on a community common bond.

In addition to general chartering requirements, special requirements pertaining to multiple-group applications must be satisfied before NCUA will grant such a charter.

a. Each group to be included in the proposed field of membership of the Federal credit union must have its own common bond.

. . .

An example of a multiple-group field of membership is:

"The field of membership of this Federal credit union shall be limited to those having the following common bond:

1. Employees of DuPont Corp. who work in Wilmington, Delaware:

2. Partners and employees of the law firm of Smith & Jones who work in Wilmington, Delaware:

3. Members of the GHI Associations who live in Wilmington, Delaware, and qualify for membership in accordance with its constitution and bylaws.

Supreme Court, U.S.
FILED
SEP 1 1993
OFFICE OF THE CLERK

(3)

No. 92-2010

In the Supreme Court of the United States

OCTOBER TERM, 1993

AT&T FAMILY CREDIT UNION, ET AL., PETITIONERS

v.

FIRST NATIONAL BANK & TRUST COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DOUGLAS N. LETTER
JONATHAN R. SIEGEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

The Federal Credit Union Act states that "Federal credit union membership shall be limited to groups having a common bond of occupation or association." 12 U.S.C. 1759. The question presented is whether banks are within the zone of interests protected by the "common bond" requirement of the Act, so as to have standing, in an action under the Administrative Procedure Act, to challenge the government's approval of a credit union's expansion.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Branch Bank & Trust Co. v. *NCUA*, 786 F.2d 621 (4th Cir. 1986), cert. denied, 479 U.S. 1063 (1987)	5-6
Clarke v. *Securities Industry Ass'n*, 479 U.S. 388 (1987)	4, 5, 6
Hazardous Waste Treatment Council v. *Thomas*, 885 F.2d 918 (D.C. Cir. 1989)	4
Hazardous Waste Treatment Council v. *United States Environmental Protection Agency*, 861 F.2d 277 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989)	4
Investment Company Institute v. *Camp*, 401 U.S. 617 (1971)	5

Statutes:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.*	3
Federal Credit Union Act, 12 U.S.C. 1751 *et seq.*:	
12 U.S.C. 1751-1795k	2
12 U.S.C. 1754	2
12 U.S.C. 1757(5)	2
12 U.S.C. 1757(6)	2
12 U.S.C. 1759	2
12 U.S.C. 1760	2
12 U.S.C. 1766(a)	2

Miscellaneous:

	Page
45 Fed. Reg. (1980):	
p. 8280	2
p. 8285	2
47 Fed. Reg. 26,808 (1982)	3
48 Fed. Reg. 22,899 (1983)	3
49 Fed. Reg. 46,536 (1984)	3
54 Fed. Reg. 31,165 (1989)	3

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-2010

AT&T FAMILY CREDIT UNION, ET AL., PETITIONERS

v.

FIRST NATIONAL BANK & TRUST COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 988 F.2d 1272. The opinion of the district court (Pet. App. 16a-25a) is reported at 772 F. Supp. 609.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1993. The petition for a writ of certiorari was filed on June 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Because the district court dismissed respondents' complaint, this statement assumes the factual allegations of respondents' amended complaint to be true.

1. The Federal Credit Union Act (FCUA or Act), 12 U.S.C. 1751-1795k, authorizes the formation and regulation of federal credit unions and charges the National Credit Union Administration (NCUA) with administering the Act. The NCUA is responsible for, among other things, ruling on applications for federal credit union charters and amendments to such charters. 12 U.S.C. 1754. The Act contains various requirements regarding the field of membership of a federal credit union. As relevant here, the Act provides that federal credit union membership shall be limited to "groups having a common bond" of occupation, association, or location. 12 U.S.C. 1759.[1]

Pursuant to its power to prescribe rules and regulations for the administration of the Act, see 12 U.S.C. 1766(a), the NCUA has on several occasions exercised its authority to regulate credit union membership. In particular, the NCUA has defined a "common bond" as "the sharing of some unifying factor or characteristic among persons that simultaneously links them together and distinguishes them from the general public." 45 Fed. Reg. 8280, 8285 (1980). In addition, the NCUA has interpreted the statutory directive that credit union membership be limited to "groups having a common bond" to allow more than one occupational or associational group to be included within the field of membership of a federal

---

[1] The field of membership is important for several reasons. The credit union generally may make loans only to its members or other credit unions, 12 U.S.C. 1757(5); it is funded by shares purchased by its members, 12 U.S.C. 1757(6); and it is run democratically, with each member entitled to one vote, 12 U.S.C. 1760.

credit union as long as each group has a common bond. That interpretation is set forth in a series of Interpretive Ruling and Policy Statements (IRPS). See 47 Fed. Reg. 26,808 (1982) (IRPS 82-3); 48 Fed. Reg. 22,899 (1983); 49 Fed. Reg. 46,536 (1984) (IRPS 84-1); 54 Fed. Reg. 31,165 (1989) (IRPS 89-1).

2. This case involves the NCUA's application of the common bond requirement to petitioner AT&T Family Federal Credit Union (Family Federal). At one time, Family Federal primarily served the employees of AT&T Technologies, Inc., AT&T Network Systems, and Bell Telephone Labs. Pet. App. 4a. In recent years, however, Family Federal received approval from the NCUA to expand its membership to include the employees of other employers, such as Black & Decker and Duke Power Company. C.A. App. 13. In 1989 and 1990, the NCUA approved applications allowing members of 16 new employee groups to become members of Family Federal. Pet. App. 4a; C.A. App. 19-23.

3. The plaintiffs in this case, respondents here, are four North Carolina commercial banks and the American Bankers Association in its representative capacity (collectively, the Banks). C.A. App. 23-26. The banks filed this action against the NCUA in the United States District Court for the District of Columbia in December 1990. *Id.* at 3. Family Federal and the Credit Union National Association later intervened as defendants. *Id.* at 4a. The action was brought under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* C.A. App. 8.

The Banks alleged that the NCUA's approval of Family Federal's applications violated the common bond requirement. C.A. App. 20-21. Each bank alleged that NCUA's approvals of Family Federal's expansion subjected it "to unlawful competition in its business or potential business." *Id.* at 23-24. The banks asked the

court to declare unlawful NCUA's approval of Family Federal's prior applications to serve unrelated employee groups and to "[p]ermanently enjoin[] defendants from approving credit union membership or services to select employee groups unrelated to the AT&T employee group." *Id.* at 28.

The district court granted the NCUA's motion to dismiss this action for lack of standing. C.A. App. 37-47. The court observed that, under D.C. Circuit precedent concerning the "zone of interests" test:

> [t]hose not regulated by an agency have standing only if they are the intended beneficiaries of the specific statute or are nonetheless "suitable challengers" to the statute because their interests coincide with the interests which Congress did intend to protect. A party is a suitable challenger if its interests coincide systematically, and not simply fortuitously, with the interests of those whom Congress intended to protect.

Id. at 42 (citing *Hazardous Waste Treatment Council* v. *Thomas*, 885 F.2d 918 (D.C. Cir. 1989), and *Hazardous Waste Treatment Council* v. *United States Environmental Protection Agency*, 861 F.2d 277 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989)). Applying that approach, the district court first determined that banks were not the intended beneficiaries of the FCUA, in general, or of the common bond requirement, in particular.[2]

---

[2] The court distinguished *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388 (1987), which held that a competitor had standing to challenge an administrative decision that permitted a bank to enter a line of business allegedly in violation of a statute restricting such entry, on the ground that the "common bond" requirement of the Federal Credit Union Act was not intended to be a restriction on entry. Pet. App. 24a-25a.

The court next determined that banks are not "suitable challengers to actions taken under the authority of the FCUA." C.A. App. 44. The court noted that the Fourth Circuit had reached the same conclusion "when presented with facts virtually identical to these" in *Branch Bank & Trust Co.* v. *NCUA*, 786 F.2d 621 (1986), cert. denied, 479 U.S. 1063 (1987).

4. The court of appeals reversed and remanded. It stated that, "[a]lthough we agree with the district court that the [banks] were not intended beneficiaries of the FCUA, we think that they are suitable challengers because the statute arguably prohibits the competition of which they complain." Pet. App. 2a.

The court of appeals concluded that "[t]his case * * * falls within the rationale of" *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388 (1987), and *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971). Pet. App. 2a. It gleaned from those decisions "the principle that a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect." *Id.* at 9a. That principle applied here, the court of appeals determined, because "[l]ike more classic entry restrictions, the common bond requirement * * * effectively prevents the credit union from offering its services and competing in a broader market." *Ibid.*

DISCUSSION

We agree with petitioner Family Federal that the respondent banks are not within the zone of interests protected by the common bond provision of the Federal Credit Union Act. Moreover, as petitioner points out, the decision below conflicts with the Fourth Circuit's decision in *Branch Bank & Trust Co.* v. *NCUA*, 786 F.2d

621 (1986), cert. denied, 479 U.S. 1063 (1987). We nonetheless believe that further review is not warranted at this time because the case is in an interlocutory posture.

To date, the proceedings in this case have addressed only the zone-of-interests question. The district court dismissed the action on the ground that the respondent banks are outside the zone of interests protected by the Act; it accordingly had no occasion to address the merits of this case—*i.e.*, the validity of the NCUA's interpretation of the statutory "common bond" requirement, which permits federal credit unions to include select employer groups that do not have a common bond, as long as members within each group do have a common bond. The court of appeals likewise had no occasion to address the merits of the case, but instead remanded to the district court to consider the common bond issue in the first instance.

Although there is considerable force to petitioner's submission that the circuit conflict on the threshold issue of standing should be resolved now, on balance we do not urge the Court to do so. Permitting the case to proceed on the merits in the district court could conserve judicial resources, including those of this Court. After the district court rules on the merits, it can reasonably be anticipated that there will be a new round of proceedings in the court of appeals. Those proceedings might result in the filing of another petition for a writ of certiorari. In that event, this Court would have the opportunity to review the standing question, as well as the question of the validity of the NCUA's interpretation of the Act, in a single proceeding. Compare *Clarke*, 479 U.S. at 393-394 (Court grants certiorari to review issue of standing and issue of validity of Comptroller of the Currency's statutory interpretation).

We therefore suggest that the Court await final resolution of the case by the lower courts before considering certiorari.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DOUGLAS N. LETTER
JONATHAN R. SIEGEL
Attorneys

SEPTEMBER 1993

Supreme Court, U.S.
FILED
SEP 17 1993
OFFICE OF THE CLERK

No. 92-2010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

AT&T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

PAUL J. LAMBERT
(Counsel of Record)
TERESA BURKE
BINGHAM, DANA & GOULD
1550 M Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 822-9320

Attorneys for Petitioners

September 17, 1993

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

PETITIONERS' REPLY TO THE BRIEFS FILED BY THE NONFEDERAL AND FEDERAL RESPONDENTS

Petitioners AT&T Family Federal Credit Union ("Family Federal") and Credit Union National Association, Inc. ("CUNA") submit this reply pursuant to Supreme Court Rule 15.6 to respond to several arguments first raised in the briefs filed by the federal and nonfederal respondents.

1. First, the nonfederal respondent banks (the "Banks") have mischaracterized Family Federal and CUNA's primary argument. They state:

> AT&T Credit's principal argument (Pet. at 7) is that a competitor has standing only if it can show that Congress had an "intent to benefit" the plaintiff.
>
> Banks' Opp. at 9.

They follow this erroneous description by pointing out that *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987), specifically stated that the zone of interests test does not require any "indication of Congressional intent to benefit the would-be plaintiff." *Id.* This leaves the impression that accepting Petitioners' "principal argument" requires overruling *Clarke*.

Petitioners did note at page 7 of their petition that the Court in *Air Courier Conference v. American Postal Workers' Union*, 498 U.S. 517 (1991), denied standing where the plaintiff postal workers had failed to show that the statute was intended for their benefit. However, Petitioners' primary argument is that under *Clarke*, as well as *Air Courier*, the plaintiffs must show that their interests were among those that Congress intended to protect. (*See, e.g.*, Pet. at 7: "Under the zone of interest test, congressional intent to protect interests including those of the potential plaintiff is the critical determining factor for prudential standing.") Here, the Banks assert competitive interests. Thus, they must show that when Congress ap-

proved the common bond provision, it arguably legislated against the competition being challenged. In *Clarke*, the Court employed this test and ruled it had been met. 479 U.S. at 403. Petitioners assert that the Banks have failed to satisfy the same test.

2. The NCUA, federal respondent in this action, expressed agreement with the petitioners' arguments that the decision below was erroneous and reflects a split in the Circuits. However, it counseled that further review of the standing issue should await a determination of the merits so that the standing issue and the issue on the merits can be presented to the Court at the same time. It asserted that this approach "could conserve judicial resources, including those of this Court." (NCUA Opp. at 6.) This view is misguided for two reasons.

First, there is no reason to believe that the standing issue will be presented to the Court after a decision on the merits. If NCUA and Family Federal prevail on the merits, it is doubtful whether the banks will seek *certiorari*. They may prefer to accept defeat on the merits rather than risk the loss of a standing precedent that permits continued common bond litigation in other cases. In this event, the D.C. Circuit's decision will have indefinite viability. This will allow more federal court litigation and result ultimately in a greater expenditure of judicial resources.[1]

---

[1] Since the petition for *certiorari* was filed on June 21, 1993, litigation by banks against credit unions has been commenced in two states, Michigan (*Community First Bank, et. al., v. NCUA*, No. 5:93-cv-59 (W.D. Mich.)) and Utah (*Utah Bankers Ass'n v. America First Credit Union, et. al.*, No. 430904939CV (3rd Judicial District of Salt Lake County). In *Community First*, the District Court denied the NCUA's motion to dismiss on the basis of prudential standing, relying on the D.C. Circuit's opinion that is sought to be reviewed here, but expressing reservations about doing so: "This Court is not at all certain that recognizing the plaintiffs' standing in this case will not do what even *Clarke* proscribes, which is 'to exclude those plaintiffs whose suits are

Second, even if this case is presented to the Supreme Court again, two or more years will elapse in the meantime.[2] During that period, credit unions and NCUA are likely to be exposed to substantial litigation elsewhere. This will lead to the expenditure of additional judicial resources, not their conservation. In short, judicial resources can be best conserved if the Court accepts the opportunity to resolve the standing issue raised by this case.

3. In their petition, Family Federal and CUNA asserted that while the standing issue raised here was of general significance, it was particularly important to credit unions. The District of Columbia Circuit's decision permits banks to commence federal court litigation to challenge every charter amendment that extends a credit union's field of membership. Widespread litigation would place substantial burdens on credit unions. (Pet. at 16-17).

In response, the banks seek to minimize this concern, contending that a "prediction of disruption" is no reason to grant *certiorari*. They state that other agencies face the "possibility" of competitive standing suits and this does not impair their ability to carry out their responsibilities. (Banks' Opp. at 11-12). However, the American Bankers Association is already actively encouraging this litigation. Its Executive Director of Communications, touting the Association's upcoming convention in an article appearing in the August 3, 1993 edition of the *Bankers News* (the biweekly newspaper of the Association), leads her column with:

---

more likely to frustrate than to further statutory objectives.' " Slip Op. at 7 (App. 7a).

[2] The action was commenced in the district court on December 4, 1990. NCUA's Motion to Dismiss for lack of standing was filed on February 6, 1991 and decided on August 9, 1991. The D.C. Circuit decided the appeal on April 2, 1993. Thus, more than two years elapsed from the filing of a motion raising the standing issue and its review by the D.C. Circuit. There is no reason to believe that resolution of the merits will proceed along a faster track.

> Gotta problem credit union whose common bond has more spandex than the ladies' underwear department at Sears? Find out how to sue them.

Several paragraphs later she writes:

> The goal of ABA's convention is to offer a peek at the future and arm bankers with what they'll need to compete successfully. Four days later you, too, can sue your credit union, . . .[3]

Similarly, the ABA's Annual Convention, scheduled for November 6-9, will feature a presentation enabling attendees to "find out how to sue" credit unions based on the common bond provision.

Thus, there is more than a "possibility" of litigation and a "prediction" of disruption. Widespread litigation involving credit unions which, as noted above, has already begun, is likely to continue if the D.C. Circuit's decision is allowed to stand.

---

[3] AT&T and CUNA bring this information to the Court's attention pursuant to *Tiverton Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985) and *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) as a "development which may conceivably affect an outcome." The ABA's facilitation of litigation, while not improper in itself, is relevant to show the likelihood that an increase in litigation will result from allowing the D.C. Circuit's opinion to stand—a fact that may help this Court decide whether *certiorari* is warranted.

CONCLUSION

In light of the foregoing, and for the reasons set forth in the Petition, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari in this case.

Respectfully submitted,

PAUL J. LAMBERT
(Counsel of Record)
TERESA BURKE
BINGHAM, DANA & GOULD
1550 M Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 822-9320

AT&T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 5:93-cv-59

COMMUNITY FIRST BANK, INDEPENDENT BANK, THE IONIA COUNTY NATIONAL BANK OF IONIA, and UNION BANK,

Plaintiffs,

v.

THE NATIONAL CREDIT UNION ADMINISTRATION and PORTLAND FEDERAL CREDIT UNION,

Defendants.

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

In this action, the plaintiffs, four banks, are challenging the National Credit Union Administration's ("NCUA") approval of an application by the Portland Federal Credit Union ("Portland Federal") for expansion of its membership.

This matter came before the court on June 25, 1993 for a hearing on, among other things, motions by both NCUA and Portland Federal for dismissal under Fed.R.Civ.P. 12

(b). For the reasons which follow, the court hereby **DENIES** NCUA's motion, and **GRANTS** Portland Federal's motion.

FACTS[1]

Portland Federal is a federally chartered credit union based in the city of Portland, Michigan. Because it is a federally-chartered credit union, it is subject to the requirements of the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1751 *et seq.* NCUA is a federal agency based in Washington, D.C., and is the governmental body empowered with the authority and responsibility to regulate federally chartered credit unions.

Among NCUA's powers is the approval of membership expansion requests by federal credit unions. Under 12 U.S.C. § 1759, membership in federal credit unions

> shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

The plaintiffs in this action are four banks. Plaintiff Community First Bank is a federal savings bank based in the city of Lansing, Ingham County, Michigan. Plaintiff Independent Bank is a Michigan banking corporation based in the city of Ionia, Ionia County, Michigan. Plaintiff The Ionia County National Bank of Ionia is a national bank based in the city of Ionia, Ionia County, Michigan. Finally, plaintiff Union Bank is a state chartered Michigan banking corporation based in the city of Lake Odessa, Ionia County, Michigan. All four plaintiffs allegedly provide financial services to persons in Ionia County, Michigan.

Portland Federal was formed in 1947 as an occupational credit union for the employees of the Portland Manufac-

---

[1] For purposes of resolving the motions to dismiss, the court has taken all facts pleaded in the complaint to be true.

turing Company. Since that time, Portland Federal has twice amended its charter (in 1953 and in 1981) to eventually serve customers in the City of Portland, Michigan as well as in segments of Ionia County, Clinton County, and Eaton County. On August 19, 1992, Portland Federal again applied to the NCUA for permission to amend its charter to expand its field of membership to include all of Ionia County and approximately 1/4 of Clinton County, Michigan. NCUA approved the expansion request, with some exclusions, on March 1, 1993.

On May 14, 1993, plaintiffs filed their complaint in this action, asserting causes of action against Portland Federal and NCUA under the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1751 *et seq.* and the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.* and contending that the approved expansion does not meet the statutory and regulatory criteria limiting membership in community-based credit unions. They seek declaratory and injunctive relief invalidating NCUA's decision and preventing Portland Federal from operating within the expanded field of membership.[2] On June 8, 1993, Portland Federal filed its motion to dismiss, contending (1) that the plaintiffs lack standing to sue Portland Federal under the applicable federal law, and (2) that the plaintiffs have not pleaded actionable claims against Portland Federal under the applicable federal law. On June 22, 1993, NCUA filed its motion to dismiss, contending that the plaintiffs lack standing to bring their action.

ANALYSIS

In its motion, Portland Federal asserts two bases for dismissal under Fed.R.Civ.P. 12(b)(6): (1) that the plaintiffs

---

[1] On June 7, 1993, the plaintiffs filed a motion seeking a preliminary injunction prohibiting Portland Federal from operating outside its pre-March 1, 1993 field of membership. However, upon being advised of the court's stated intention to expedite this action, plaintiffs agreed to withdraw their motion.

have not pleaded actionable claims against Portland Federal because no private right of action exists against Portland Federal under the APA or the FCUA; and (2) that the plaintiffs lack standing to sue under either of these statutes, as they do not fall within the "zone of interests" sought to be protected under the FCUA. NCUA's motion merely challenges plaintiffs' standing to sue NCUA under the "zone of interests" test.

At the outset, the court will address the standing issue. Both Portland Federal and NCUA contend that the plaintiffs lack standing to challenge the alleged violations of the FCUA's restrictions on membership because the plaintiffs do not fall within the "zone of interests" protected by the FCUA.[3] The "zone of interest" standing test was first articulated by the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp,*

---

[3] Standing comes in two forms, both of which are required in order to allow the plaintiffs to proceed: (1) constitutional standing, which requires the plaintiffs to show an injury (the traditional Article III "case or controversy" requirement), and (2) prudential standing, which requires the plaintiffs to show that the interest which they seek to protect is arguably within the zone of interests to be protected or regulated by the statute in question. *See generally District 2, Marine Engineers v. Burnley,* 936 F.2d 284, 285-86 (6th Cir. 1991). In its motion, Portland Federal originally contended that the plaintiffs had established neither form of standing, while NCUA limited its attack to plaintiffs' prudential standing. However, at the hearing, Portland Federal abandoned its argument that plaintiffs cannot establish constitutional standing. Even had they not abandoned this argument, the court would have rejected it. Plaintiffs allege that they will suffer economic losses should Portland Federal be allowed to continue to operate under the allegedly illegal expanded charter. This allegation of injury to business or economic interests suffices to fulfill the constitutional requirement of standing. *Jet Courier Services v. Federal Reserve Bank of Atlanta,* 713 F.2d 1221, 1226 (6th Cir. 1983);*see also Branch Bank and Trust Co. v. National Credit Union Administration Board,* 786 F.2d 621, 624 (4th Cir. 1986) (finding constitutional standing requirements satisfied in addressing virtually identical claim, although finding no prudential standing), *cert. denied,* 479 U.S. 1063 (1987).

397 U.S. 150 (1970). In *Camp,* the Court noted that the APA grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The Court favored giving this provision a broad interpretation, noting that "the trend" was "toward enlargement of the class of people who may protest administrative action." 397 U.S. at 154.

In its analysis of the zone of interest standing issue, the court has focused on three cases which it considers to be the most pertinent—the Supreme Court's 1987 decision in *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 107 S.Ct. 750 (1987); the Fourth Circuit's on-point decision in *Branch Bank & Trust Co. v. National Credit Union Administration Board,* 786 F.2d 621 (4th Cir. 1986); and the District of Columbia Circuit's very recent, on-point decision in *First Nat'l Bank & Trust Co. v. National Credit Union Administration,* 988 F.2d 1272 (D.C. Cir. 1993).[4]

The facts in *Clarke* involved a trade association representing securities brokers, underwriters, and investment bankers who challenged a decision by the Comptroller of the Currency allowing two national banks permission to open offices which would offer discount brokerage services. The securities' industry challenge was based on the McFadden Act, which restricts interstate branching of national banks. The Court, relying on a perceived congressional objective of preventing national banks from gaining monopoly control over credit through unlimited branching, held that the association was a proper party to bring the action. The Court held as follows:

---

[4] The District of Columbia Circuit issued it decision in *First National* on April 2, 1993. One of the permissive intervenors in that case, the Credit Union National Association ("CUNA"), has been granted leave to appear as an amicus curiae in this proceeding. CUNA has advised the court that it has been granted a stay of the issuance of the mandate in *First National,* and that a petition for writ of certiorari has been filed in the Supreme Court in that case.

> The interest respondent asserts has a plausible relationship to the policies underlying §§ 36 and 81 of the National Bank Act. Congress has shown a concern to keep national banks from gaining a monopoly control over credit and money through unlimited branching. Respondent's members complete [sic] with banks in providing discount brokerage services—activities which give banks access to more money, in the form of credit balances, and enhanced opportunities to lend money, viz., for margin purchases. 'Congress [has] arguably legislated against the competition that [respondent seeks] to challenge,' . . . by limiting the extent to which banks can engage in the discount brokerage business and hence limiting the competitive impact on nonbank discount brokerage houses.

107 S.Ct. at 759. Therefore, based upon *Clarke,* it is clear that the Supreme Court recognizes the concept of competitor standing, where although the competitor may not be an intended beneficiary of a statute, it nonetheless may be considered a reasonable candidate to seek review of administrative action.

Before *Clarke,* the Fourth Circuit in *Branch Bank* rejected application of "competitor standing" to banks who, like the plaintiffs in this case, sought protect their market position by challenging a decision by NCUA approving the formation of a credit union. In its holding, the court focused on the lack of indication of a congressional intent to protect the competitive interests of banks, noting that "the common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks." 786 F.2d at 626.

While the reasoning n *Branch Bank* is persuasive, however, the District of Columbia Circuit's contrary decision

in *First Nat'l Bank,* coming as it does in the wake of *Clarke,* is the most recent statement by an appellate court on the issue. In *First Nat'l Bank,* the court acknowledged that "Congress did not, in 1934, intend to shield banks from competition from credit unions." 988 F.2d at 1275. "Indeed," the court noted, "the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." *Id.*[5] Nonetheless, while recognizing that Congress was not at all concerned about the competitive position of banks, the court held that by imposing a statutory entry restriction limiting the markets of credit unions, Congress effectively prevented the competition about which the banks were concerned. Therefore, the court in *First Nat'l Bank* held that the banks had established standing because their interests were congruent with those of the intended statutory beneficiaries. *Id.* at 1277.

This court is not at all certain that recognizing the plaintiffs' standing in this case will not do what even *Clarke* proscribes, which is "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." 107 S.Ct. at 756 n.12. As the District of Columbia Circuit recognized in *First Nat'l Bank,* there is not one iota of evidence that Congress intended to benefit banks in passing the FCUA. 988 F.2d at 1273. Still, *Clarke,* represents an extremely broad interpretation of the zone of interest requirement, and *First Nat'l Bank* is consistent with that trend. Therefore, the court concludes that the plaintiffs in this action have standing to challenge the NCUA's decision.

---

[5] The court in *First Nat'l Bank* noted that the common bond requirement appears to have been intended to ensure the success of credit unions by ensuring that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default. 988 F.2d at 1276.

While recognition that the plaintiffs have standing to sue NCUA under the APA as persons "aggrieved by agency action" within the meaning of the FCUA requires the court to deny NCUA's motion to dismiss, Portland Federal has raised an additional ground which it contends requires the dismissal of plaintiffs' claims against it. Specifically, Portland Federal argues that no private right of action exists against it under the APA or the FCUA.

Portland Federal is correct insofar as it contends that there is no specific grant of statutory authority for plaintiffs' action against it. Indeed, the plaintiffs have made no attempt to identify a specific statutory provision in either of the relevant statutes which grants them an express or implied private right of action. As the Sixth Circuit has noted, "all of the federal decisions which have examined whether a private right of action is implied under the FCUA have concluded that no such implied cause of action exist." *Smith v. Dearborn Financial Services, inc.*, 982 F.2d 976, 979 (6th Cir. 1993). However, the plaintiffs contend that they have a federal common law *quo warranto* cause of action against Portland Federal because it is operating under an invalid charter which exceeds the restrictions imposed on membership under the 12 U.S.C. 1759.

Quo warranto is a remedy or proceeding by which to determine the legality of a claim which a party asserts to the use or exercise of an office or franchise, and to oust the holder from its enjoyment if the claim to the office or franchise is not well-founded. 65 Am. Jur.2d § 1. Plaintiffs argue that in two cases, courts have recognized the availability of *quo warranto* relief under the federal common law of the FCUA. *See Barany v. Buller*, 670 F.2d 726 (7th Cir. 1982) and *Rosenberg v. AT&T Employees Federal Credit Union*, 726 F. Supp. 573 (D.N.J. 1989).

In *Barany*, the plaintiffs were employees of a credit union who brought an action challenging their removal

from the credit union's credit committee (under the FCUA, such committees are required). The Seventh Circuit allowed the plaintiffs to seek *quo warranto* relief, concluding that their removal from their positions implicated "uniquely federal interests" and the uniform administration of federal credit unions. 670 F.2d at 731-32.[6] Similarly, in *Rosenberg,* the plaintiff had sought election to the credit union's Board of Directors pursuant to its FCUA-mandated bylaws. Following *Barany,* the court in *Rosenberg* also concluded that a private federal common law remedy could be created. 726 F. Supp. at 579.

In contrast, in *Smith,* the plaintiff was a former credit union member who was seeking to enforce a federal regulation which provides that credit unions may only sell family group life insurance to members at cost. Plaintiff had purchased such insurance, and the credit union had apparently received a return of some of the premiums for the insurance but had merely used these to purchase "free" additional insurance for members rather than returning small sums to each individual purchaser. Without rejecting *Barany,* the Sixth Circuit affirmed the district court's decision holding that there was no need to create a federal common law remedy.[7] More specifically, the court in *Smith*

---

[6] There are basically two categories of instances in which federal common law may be developed: (1) where "necessary to protect uniquely federal interests," and (2) where Congress has given the courts the power to develop substantive law. *Smith,* 982 F.2d at 981. Under the FCUA, Congress has not given the courts the authority to develop substantive law, and therefore a "uniquely federal interest" must be found before a federal common law right of action may be recognized. *See id.*

[7] In *Ridenour v. Andrews Federal Credit Union,* 897 F.2d 715 (4th Cir. 1990), the Fourth Circuit refused to allow the creation of a federal common law remedy under the FCUA, specifically declining to follow *Barany.* In *Ridenour,* the plaintiffs were credit union employees who claimed that they had been subjected to adverse employment actions for reporting alleged sexual harassment by the credit union president

held that *Barany* was distinguishable because it involved the internal administration of a federal credit union. 982 F.2d at 1981. The court stated that no "uniquely federal interest" existed justifying the creation of a federal common law remedy for a dispute involving the sale of insurance. *Id.* at 983. *Cf. Heller v. CACL Federal Credit Union*, 775 F. Supp. 839, 843 (E.D. Pa. 1991) (holding that creation of federal common law remedy of *quo warranto* under FCUA "would circumvent congressional intent").

The difficulty presented by plaintiffs' assertion of a right to *quo warranto* relief in this case is that *quo warranto* relief is not an end in itself; rather, it is a remedy which must arise out of a statutory or common law right.[8] The plaintiff have no express or implied statutory right of action against Portland Federal under the FCUA; *Smith* tells us so. Moreover, whether a federal common law remedy should be created—which is a separate issue—depends on the existence of a "uniquely federal interest." However, the plaintiffs are not themselves seeking to enforce a

---

and others. The Fourth Circuit noted that

> [t]he category of unique federal interests justifying the creation of federal common law has been sharply circumscribed by the Supreme Court. Sufficient interests have been found only in cases involving 'the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty . . .'

897 F.2d at 722 (quoting *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 641 (1981)).

[8] Another difficulty presented by plaintiffs' reliance on this remedy is that the right to institute *quo warranto* proceedings has apparently historically been recognized as belonging to the State, unless delegated by the State to individuals. *See* 65 Am. Jur.2d § 60. Moreover, the remedy appears to be something of a drastic one, and may not ordinarily be maintained if there are other adequate remedies available, either at law or in equity. 65 Am. Jur.2d § 11. In *Smith*, the Sixth Circuit described *quo warranto* as "an extremely difficult and uncertain remedy." 982 F.2d at 981.

"uniquely federal interest" created for their benefit; rather, they are merely attempting to limit what they allege is a "substantial competitive advantage" restricting from Portland Federal's allegedly illegal expanded charter. The court fails to discern anything "uniquely federal" in what essentially amounts to a claim of economic harm against Portland Federal. Moreover, notably, in *Rosenberg,* one case on which the plaintiffs rely, the court focused in part on the fact that the plaintiffs in that case had demonstrated that they had no administrative remedy for their grievance against the credit union in connection with its alleged violation of its bylaws. 726 F. Supp. at 579.[9] In this case, in contrast, the plaintiffs are specifically alleging that they have a right to seek review of the alleged illegality of Portland Federal's expanded charter through an action against NCUA under the APA. Thus, because the court has found that the plaintiffs have standing to sue the NCUA under the APA, then the plaintiffs have a federal remedy at law which enables them to seek invalidation of the expanded charter.

Therefore, by reason of the fact that the plaintiffs have a remedy at law available under the APA to challenge the allegedly illegal expanded charter, there is no basis for the recognition of a federal common law action in *quo warranto* against Portland Federal under the FCUA. Because the plaintiffs have identified no federal cause of action against Portland Federal under either the NCUA

---

[9] In *Rosenberg,* the plaintiffs had initially sought to remedy the defendant's alleged breach of its bylaws by proceeding before the NCUA. However, the NCUA informed them that it would not become involved in the dispute. Thus, the court concluded that it was "apparent from [NCUA]'s opinion, that plaintiff cannot look to a federal agency to ensure the uniform effect of a federal credit union's bylaws." 726 F. Supp. at 579. In contrast, in this case, NCUA has been empowered by Congress to approve a federal credit union's request for membership expansion.

or the APA, the court dismisses plaintiffs' claims against Portland Federal for failure to state a claim.

CONCLUSION

For the foregoing reasons, NCUA's motion to dismiss is **DENIED** and Portland Federal's motion to dismiss is **GRANTED** for failure to state a claim.

So ordered this 25th day of June, 1993.

/s/ Wendell A. Miles
Wendell A. Miles, Senior Judge